

THE INDIAN LAW REPORTS,

BOMBAY SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT BOMBAY, AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT

Editors

L J ROBERTSON, *Barrister at Law (Resigned)*
W L WELDON *Barrister at Law*

Reporters

PRIVY COUNCIL — J V WOODMAN, *Barrister at Law*

HIGH COURT, BOMBAY —
B N LANG, *Barrister at Law*
KENNETH McI KEMP, *Barrister at Law (Acting)*
GANGARAM BAPSOBA RELE, *Vakil, High Court*
RATANLAL RANCHHODDAS, *Vakil, High Court*

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JUDGES OF THE HIGH COURT

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B 1403—*a*

ERRATA

Page 97, catchwords (italics) 2nd line, for "*(Bom Act V of 1889)*" read "*(Bom Act V of 1879)*"

Page 448, catchwords (italics) 1st line, for "*(Act V of 1908), O XXXIII, r 13*" read "*(Act V of 1908) O XXXIII, r 12*"

B 1403

ORIGINAL CRIMINAL

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Held that the interest claimed should be awarded, inasmuch as the claimant had had the benefit of the money belonging to Government in excess of that to which the High Court held him to be entitled, and the benefit was represented not only by the excess wrongly taken by the claimant from the District Court but also the amount of interest which the excess carried

Mool oond Lal Pal v *Mohomed Sami Meah* (1887) 14 Cal 484 at p 486 and *Govind Vaman* v *Sakharam Ramchandra* (1878) 3 Bom 42, referred to

COLLECTOR OF AHMEDABAD *v* LAVJI MULJI (1911) 35 Bom 255

———————— ORDER I RULE 10—*Limitation Act (IX of 1908) Art 171—Partition suit—Death of a party—Abatement—Application to set aside the abatement—Limitation of sixty days—In a partition suit all parties should be before the Court—Inherent power of the Court to add a party at any stage of the suit for the ends of justice*] On the 5th April 1893 the plaintiff obtained a decree for partition and died in October 1893 leaving him surviving a minor son who attained majority in February 1907 At a very late stage of the execution proceedings the son made an application on the 16th April 1910 for the issue of a commission to effect partition according to the rights declared in the partition decree

Held that as soon as the Civil Procedure Code (Act V of 1908) came into force the suit abated so far as regarded the applicant's father who was a party and the application to set aside the abatement by adding the applicant as the legal representative of the deceased not having been made within sixty days under Article 171 of the Limitation Act (IX of 1908) the application was time barred

Held further that in a partition suit all the parties should be before the Court and that there was nothing in the Civil Procedure Code (Act V of 1908) limiting or affecting the inherent power of the Court to make such orders as might be necessary for the ends of justice

LAKHMICHAND PEWALCHAND *v* KACHUBHAI (1911) 35 Bom 393

———————— ORDER V RULE 25—*Practice—Procedure—Service of summons by registered post on defendant residing out of British India—Summons returned marked Refused to take—General Clauses Act (X of 1897) sec 27*] A summons was sent by registered post addressed to the first defendant at Navalgarh in the State of Jaipur and purported to be sent in accordance with the provisions of Order V Rule 25, of the Civil Procedure Code (Act V of 1908) The cover was returned with an endorsement in the vernacular which was translated as follows — Refused to take. The handwriting of Chunilal postman

Held that as it appeared that the cover was properly addressed to the first defendant and had been registered duly stamped and posted the Court was entitled to draw the inference indicated in section 27 of the General Clauses Act and to hold that there was sufficient service

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Per Curiam—The only rule if it can be called a rule to be laid down is that the Court must be guided in each case by its special circumstances as to how far it will give effect to a return of a cover endorsed 'refused' or words to the like effect

Jagannath Brahbhau v J E Sassoon (1893) 18 Bom 606, distinguished

BALURAM RAMKISSEN v BAI PANNABAI (1910) 35 Bom 213

CIVIL PROCEDURE CODE (ACT V OF 1908) ORDER XXI RULE 1—*Decree—Payment of money ordered in a decree—Payment ordered on a fixed date—Delay in making payment into Court owing to closing of Court—Payment on the opening day—General Clauses Act* (X *of* 1897) *sec* 10—*Practice*] A decree provided as follows The plaintiff should pay by the 10th day of April 1909 to the defendant Rs 100 If the moneys are not paid by the plaintiff as agreed upon the property in dispute will remain with the defendants by right of ownership and the plaintiff will have no right of ownership over the same The plaintiff chose to pay the money into Court and finding it closed on the 10th she paid the money on the 14th April 1909 the day on which the Court re opened. A question having arisen whether the payment so made was within the terms of the decree

Held that the payment was properly made for Order XXI Rule 1 of the Civil Procedure Code 1908 intended to enact and did enact that payment into Court was a valid compliance with the decree even though the decree directed payment to the decree holder

WANA MARD RAVJI v NATU WALAD MURHA (1910) 35 Bom 35

——— ORDER XXI RULE 29—*Indian Arbitration Act* (*IX of* 1899) *secs* 11 *and* 15— *Award*] An award filed in Court under section 11 of the Indian Arbitration Act (IX of 1899) is nothing more than an award although it is enforceable as if it were a decree

Execution of such an award cannot be stayed under Order XXI Rule 29 of the Civil Procedure Code (Act V of 1908)

TRIBHUWANDAS KALLIANDAS GAJJAR v JIVANCHAND LALLUBHAI AND CO (1910) 35 Bom 196

——— ORDER XXI, RULE 91—*Contract Act* (*IX of* 1872) *sec* 18, *cl* (3)—*Stamp Act* (*II of* 1899) *sec* 35—*Court sale—Discovery that the judgment debtor had no saleable interest—Failure of consideration—Suit by auction purchaser for possession or return of purchase money—Relations of the judgment creditor and auction purchaser—Suit not cognizable by Small Causes Court—Unstamped document regarded as non existent*] A court sale purchaser, having discovered that the judgment debtor had no saleable interest in the property sold brought a suit against the judgment creditor for recovery of possession of the property or in the alternative return of the purchase money on the footing of total failure of consideration A question having arisen as to whether the suit was maintainable,

Held the suit was maintainable inasmuch as under the Civil Procedure Code (Act V of 1908) there was an implied warranty of some saleable interest when the right title and interest of a judgment debtor was put up for sale and the purchaser s right based on such implied warranty to a return under certain conditions of the purchase money which had been received by the judgment creditor was recognized The relations of the parties, namely the judgment creditor and the court sale purchaser, were in the nature of contract

Held further that such a suit though the subject matter was less than Rs 500 was not cognizable by a Court of Small Causes there being a prayer for possession of immoveable property

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An unstamped document being inadmissible in evidence must be taken as non existent.

RUSTOMJI ARDESHIR IRANI v. VINAYAK GANGADHAR BHAT (1910) 35 Bom 29

CIVIL PROCEDURE CODE (ACT V OF 1908) ORDER XXIII, ORDER X RULE 11—*Suit to recover possession—Dismissal of suit—Appeal—Application for withdrawal of suit with leave to bring a fresh suit—Power of the Court*] Plaintiff's suit to recover possession of lands having been dismissed by the first Court he appealed to the District Court and before the admission of the appeal he applied to that Court for leave to withdraw the suit and bring a fresh suit The application was heard and granted by the District Judge without any notice to the defendant The defendant having applied for revision under the extraordinary jurisdiction (section 115 of the Civil Procedure Code Act V of 1908) of the order granting the withdrawal

Held setting aside the order that it was beyond the power of the Court to allow a withdrawal from a suit with leave to file a fresh suit on the same cause of action after the defendant had obtained a decree in his favour

EKNATH v. RANOJI (1911) 35 Bom 261

——— ORDER XXV RULE 1—*Infant plaintiff—Security for costs—Practice*

See PRACTICE 339

——— ORDER XXV RULE 1—*Woman plaintiff—Application for security for costs—Suit for defamation—Court's discretion*] N a widow brought an action against D praying that D might be restrained from repeating or publishing certain defamatory statements concerning N and that D might be ordered to pay Rs 5,000 or such other sum as the Court should think fit as damages D took out a summons in Chambers calling upon N to show cause why she should not give security for the payment of D's costs under Order XXV Rule 1 Civil Procedure Code (Act V of 1908)

Held that under the circumstances of the case it would be a wrong use of the Court's discretion if the Court practically defeated the suit at that stage when it was almost if not quite ripe for hearing by ordering the plaintiff to lodge security

Held further that the Court was entitled as a discretion was given it under the section to exercise that discretion only upon certain terms which it was entitled to impose on the plaintiff

NAMUBAI v. DAJI GOVIND (1910) 35 Bom 421

——— ORDER XXXIII RULE 13—*Civil Procedure Code (Act XIV of 1882) sec 412—Suit in forma pauperis—Settlement of suit out of Court—Court passing no order for payment of court fees—Government applying for the payment—Practice and procedure*] A suit for partition brought *in forma pauperis* was settled out of Court On the 7th October 1908 the Court dismissed the suit, but made no order for the payment of court fees under section 412 of the Civil Procedure Code of 1882 At that date Government had ninety days time within which to apply to the High Court under its extraordinary jurisdiction Before the expiry of the period the new Civil Procedure Code came into force The Government, thereupon applied to the Court under Order XXXIII, Rule 12 for an order as to payment of court fees but the Court declined to make the order On appeal —

Held (1) that the order passed by the Court under Order XXXIII Rule 12 was an order within the meaning of section 47 and it was therefore appealable;

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(9) that before the expiry of the period within which the Government could have applied to the High Court under the old Code the new Code had come into force and by it the Government were enabled to apply to the Court for an order under Rule 12 of Order XXXIII

(8) that the suit having been dismissed there was a failure of P and the right accrued to Government to have the court fee from the party defeated

SECRETARY OF STATE FOR INDIA v NARAYAN (1911) 35 Bom 418

CIVIL PROCEDURE CODE (ACT V OF 1908) ORDER XXXIV RULE 14—*Transfer of Property Act (IV of 1882) sec 90—Repeal—Decree on mortgage—Execution sale—Proceeds insufficient to satisfy decree—Attachment of mortgagor's other property comprised in redemption decree for the recovery of the balance—Property attached to be sold*] H and G mortgaged their property A to R who also held in mortgage from the same mortgagors their other property B R obtained a decree on the mortgage of property A for the recovery of the mortgage-debt by sale of that property and the balance if any to be paid by the mortgagors Subsequently the mortgagor G H having died in the meanwhile got a redemption decree against R with respect to property B In execution of R s decree property A was sold but the sale proceeds were not sufficient to satisfy the decretal debt R thereupon sought to recover the balance by execution against property B and the said property was attached After attachment a question having arisen as to whether R could recover the balance of his decree by sale of property B in execution without instituting a suit for the sale of that property

Held that the Civil Procedure Code (Act V of 1908) in so far as it repealed section 90 of the Transfer of Property Act (IV of 1882) and substituted in its place Order XXXIV Rule 14 merely effected a change of procedure in the manner in which mortgaged property has to be realized in execution of money decrees and therefore the statutory rule in force for the purpose of the execution of the unsatisfied portion of the decree on mortgage was the rule contained in Order XXXIV of the Civil Procedure Code (Act V of 1908) R was therefore entitled to an order that the attached property B be sold in execution of his decree with respect to property A

BAI GANGA v RAJARAM ATMARAM (1911) 35 Bom 218

COLLECTOR—*Decree—Attachment of property—Transfer of execution proceedings to Collector—Property re attached under another decree between same parties—Second execution proceedings transferred to Collector—Claim under the first decree satisfied by compromise—Collector asked to return the darkhast as disposed—Judgment debtor alienating the property—Claim for rateable distribution under another decree—Claims enforceable under the attachment—Bills of Sale Act* 1878 *sec* 8—*Practice and Procedure—Civil Procedure Code* (*Act XIV of* 1882) *secs* 276 295 320 325*A*

See CIVIL PROCEDURE CODE 516

——————*Duties imposed upon Collectors not to be discharged by subordinate—Civil Procedure Code* (*Act V of* 1908) *sec* 93

See CIVIL PROCEDURE CODE 243

——————*Land Revenue Code* (*Bom Act V of* 1879) *sec* 79*A*—*Gujarat Talukdars Act* (*Bom. Act VI of* 1888)—*Summary eviction—Persons in wrongful possession—Possession under a decree of Civil Court—Discretion of Collector—Jurisdiction of Civil Court to examine the order*

See LAND REVENUE CODE

DEKKHAN AGRICULTURISTS RELIEF ACT (XVII OF 1879)—*Wife of an agriculturist—Status—Suit by mortgagee to recover possession—Prayer for payment of principal and interest at certain rate—Decree—Payment of principal and interest—Payment of interest at certain rate till the principal is doubled—Contractual relation not superseded by the decree—Redemption suit—Accounts*] Under the provisions of the Dekkhan Agriculturists Relief Act (XVII of 1879) the wife of an agriculturist cannot claim to be an agriculturist

A decree obtained by a mortgagee in the year 1867 to recover possession of the mortgaged property set out that the plaintiff (mortgagee) was suing for possession of the mortgaged land with a prayer that until possession should be delivered over or until the mortgage money was paid off interest should be awarded at the rate of ? per cent per mensem The decree then ordered that the mortgagor "should pay to the plaintiff (mortgagee) Rs 300 and interest Rs 2? in respect of his claim Until payment of the moneys or until the principal is doubled, interest should be paid at the rate of 2 per cent per mensem from 30th July 1867 and until payment of the moneys the land mortgaged, which was asked for in the suit should be handed over according to agreement And the defendant should redeem the land by paying the plaintiff's money

Subsequently the mortgagor having brought a suit for redemption and accounts it was contended that the plaintiff's right to have accounts taken from the mortgagee in possession was lost by reason of the aforesaid decree

Held that the terms of the decree did not deprive the mortgagor of a right to accounts The decree did not supersede the contractual relation but by

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EVIDENCE ACT (I OF 1872) SEC 91—*Mortgage—Third person redeeming the mortgage at mortgagor's desire—Sale by mortgagor of his rights—Sale deed unregistered—Sale-deed could be looked at for evidence of payment of money*

See LIMITATION ACT 438

——————— SEC 92 PRO I—*Dekkhan Agriculturists' Relief Act (XVII of 1879) sec. 10A—Redemption suit—Sale in reality a mortgage—Evidence of oral agreement varying the written document*] The plaintiff brought a redemption suit under the provisions of the Dekkhan Agriculturists Relief Act (XVII of 1879) alleging that the deed which he had executed to the defendant though on its face a deed of sale was in reality only a deed of mortgage, the defendant having promised at the time of the execution of the deed that he would allow redemption on payment of the money advanced The defendant replied that the transaction was sale

The First Class Subordinate Judge of the Dharwar District to which section 10A of the Dekkhan Agriculturists Relief Act (XVII of 1879) was not extended found on the evidence that the deed passed by the plaintiff was not proved to be really a mortgage and dismissed the suit

The plaintiff appealed urging that the proper issue in the case was as to whether the sale deed was not obtained or induced by the defendant by means of fraud or misrepresentation within the meaning of proviso I of section 92 of the Evidence Act (I of 1872) and prayed for a remand

Held confirming the decree that the plaintiff sought to make a new case in appeal in so far as he endeavoured to base his case not upon a separate oral agreement but upon some fraud which would invite the application of proviso I of section 92 of the Evidence Act (I of 1872)

Held further that in the districts to which section 10A of the Dekkhan Agriculturists Relief Act (XVII of 1879) was not extended it was not open to the Court to enter upon a defence which consisted of an allegation of an oral agreement varying the written contract

Dagdu v *Nana* (1910) 35 Bom 93 and *Sangira Malappa* v *Ramappa* (1909) 34 Bom 59 followed

Balkishen Das v *W F Legge* (1899) 22 All 149, referred to

SOMANA BASAPPA v GADIGEYA KOPNAYA (1910) 35 Bom 231

——————— SEC 92 PRO I—*Sale deed—Contemporaneous agreement—Admissibility—Fraud*] *A* desired to set aside an ostensible sale deed by proving that a representation agreement or promise was made to him at the time of execution that the deed would not be enforced as a sale deed,

Held, no evidence of such a representation, agreement or promise could be admitted for this purpose

Dattoo v *Ramchandra* (1905) 30 Bom 119 and *Keshavrao* v *Raya* (1906) 8 Bom. L R 287 followed

DAGDU VALAD SADU v NANA VALAD SALU (1910) 35 Bom 93

——————— SEC 115—*Estoppel—Acquiescence—Both parties equally conversant with true state of facts—Vague allegations—Real controversy to be ascertained by the Judge*] Where parties make vague and loose allegations it is essential to the correct determination of the suit that the real controversy should be ascertained by the Judge by questioning their legal advisers as to what is exactly their position in the matter

Where both parties to a suit are equally conversant with the true state of facts it is absurd to refer to the doctrine of estoppel

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In the year 1871 Government granted to the defendants predecessor in title a certain plot of land situate at Dhandhuka The grant expressly stated that a strip of land belonging to Government was the southern boundary of the plot so granted This statement was repeated in the mortgage deed executed by the defendants' predecessor in title to the defendants themselves in the year 1893 In the year 1895 the defendants purchased the said plot and encroached on the strip by extending their building on it Thereupon the Secretary of State for India in Council brought a suit against them to recover possession of the strip after removing the defendants encroachment The suit was brought in the year 1908 The defendants plea was that they were in possession and enjoyment for a long time and consequently there was acquiescence and estoppel on the part of the officers of Government and Dhandhuka Municipality and that they wished to lead evidence to prove their pleas

Held that the defendants title deeds having brought to their knowledge the title of the Government the doctrines of estoppel and acquiescence were not applicable, and the suit was governed by sixty years limitation the Government being a party to it

the land as against the Mahar claimants Subsequently the Collector forwarded to the District Court a certificate issued under section 10 of the Hereditary Offices Act (Bom Act III of 1874) that the order for the payment of the compensation to the objector should be set aside in accordance with the provisions of sections 10 and 13 of the Act Thereupon the District Judge holding that he had no jurisdiction to decide whether the property was Vatan or not in the face of the Collector s certificate cancelled his order

The objector having appealed against the said order

Held restoring the award of the District Court that an award under the Land Acquisition Act (I of 1894) was not a decree or order capable of execution under the Civil Procedure Code (Act V of 1908) and was therefore not within the purview of section 10 of the Hereditary Offices Act (Bom Act III of 1874)

Held further that the award of the District Court which was the cause of the certificate made it clear that the Mahars property had been acquired by the objector by adverse possession before the commencement of the proceedings for the acquisition of the land by Government

Per Curiam —Even if it could be said that there was any danger of the passing of the ownership by virtue or in execution of a decree or order in the Land Acquisition proceedings it could not be said that that result was arrived at without the sanction of Government who set the machinery of the Act in motion for the acquisition of the land

Nilkanth v *The Collector of Thana* (1897) 22 Bom 802 *Collector of Thana* v *Bhaskar Mahadev* (1884) 8 Bom 264 *Rachapa* v *Amingovda* (1880) 5 Bom 283 referred to

LADDHA EBRAHIM AND CO *v* THE ASSISTANT COLLECTOR POONA (1910) 35 Bom 146

HINDU LAW —*Adoption—Payment of money to adoptive widow by way of inducement to her to adopt a particular boy—Payment is a bribe—Gift by adoptee in consideration of sum paid by his natural father—Gift invalid—Revocation of gift*] C the natural father of N paid a sum of Rs 8 000 to B a widow as an inducement to her to adopt N After the adoption B conveyed by way of gift to C some lands at Chinchwad and got them transferred to his name Later on N conveyed in gift the lands in dispute which formed part of the property belonging to his adoptive father to his natural brother (the defendant) in consideration of the payment of Rs 8 000 made by C to B in exchange for the lands at Chinchwad and also having regard to the benefit he had derived from his adoption After the death of N his sons (the plaintiffs) challenged the gift and sued to recover possession of the lands from the defendant —

Held that the transaction amounted to a mere gift which was not supported by consideration since the payment of Rs 8 000 to B was vitiated by the fact that it was in the nature of a bribe and as such was illegal according to Hindu Law and even if it be regarded as a debt contracted by C it could not bind N first because it was contracted for an illegal purpose and secondly because N had by his adoption ceased to be C s son at the date of his gift to the defendant and was under no pious obligation to satisfy C s debts

Held, further that even if the deed of gift be regarded as supported by valuable consideration it could not bind the interest of the plaintiffs inasmuch as the property conveyed formed part of the joint ancestral estate in which they took a vested interest by their very birth

Held also, that if the transaction be regarded as one supported by valuable consideration on account of the exchange of lands at Chinchwad it could only amount to a sale of the property and even then it was not competent to N to sell joint ancestral property to the detriment of his sons except for an antecedent debt which had been contracted for a purpose neither illegal nor immoral

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Per Curiam—Where on a Hindu's death an adoption is made by his widow it must be made by her without any coercion free from any corrupt motive and with an eye solely to the fitness of the boy to be adopted to fulfil the religious and secular duties binding on a son. That object is likely to be frustrated if she is induced to adopt a boy out of greed for money and pecuniary benefit to herself. If she is so induced the money paid to her is a bribe, which is condemned by all Smriti writers as an illegal payment.

The texts of Hindu Law showing that a gift once made cannot be resumed if it is to a benefactor or to a father apply only as between the donor and the donee and relate to property which it is competent for the donor to give away. They cannot affect the joint ancestral estate of a Hindu and his sons. Their rights and liabilities are regulated by special texts dealing with that estate and such of these special texts as relate to gift form exceptions to the general texts on the subject.

SHRI SITARAM PANDIT *v* SHRI HARIHAR PANDIT (1910) 35 Bom 169

HINDU LAW—*Mitakshara—Inheritance—Paternal uncle's grandson—Paternal uncle's widow*.] Among Hindus in the Bombay Presidency governed by the law of the Mitakshara a paternal uncle's grandson is to be preferred as an heir to a paternal uncle's widow.

KASHIBAI *v* MORESHWAR RAGHUNATH (1911) 35 Bom 389

———*Partition—Partial partition—Reunion*.] Out of six co parceners in a joint Hindu family three separated under a deed of partition from the rest who continued joint as before. The Court found on these facts that the last three persons either continued as before to be co parceners or they must be held as having immediately re united with each other after executing the deed of partition. In appeal it was contended that there was no finding by the Court as to an agreement to re unite or any evidence recorded of such agreement —

Held overruling the contention, that the evidence was that the co parceners agreed to effect not a complete but partial disruption of the co parcenary that in other words three of them separated from the rest and also *inter se* and that the latter agreed to continue joint.

ANANDIBAI *v* HARI SUBA PAI (1911) 35 Bom 293

———*Will—Use of expression malik—Widow's estate—Construction*.] A Hindu died leaving a Will by which (*inter alia*) he appointed his wife as residuary legatee in the following words —"As regards whatever may remain over I appoint my wife Dhancore as the owner (*malik*) of the whole thereof." The management of the property comprising the said residue was provided for by the appointment of two persons named in the Will and certain other restrictions were placed on the management of the property by the wife. Finally provision was made for the further distribution of the property after the wife's death.

Held that the widow took a widow's estate and not an absolute estate.

The use of the expression *malik* by itself would be sufficient to give the widow an absolute estate but the knowledge of the testator as to the incidents of a widow's estate and the ordinary notions or customs of Hindus is to be considered in construing a Will.

MOTILAL MITHALAL *v* THE ADVOCATE GENERAL OF BOMBAY (1910) 35 Bom 279

HOLDING OVER—*Transfer of Property Act (IV of 1882) sec 108—Landlord and tenant—Sub lessee—Avoidance of lease—Vacant possession*.

See LANDLORD AND TENANT 333

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The District Judge found that the objector had acquired title to the land by adverse possession and thus became entitled to the compensation on account of the land as against the Mahar claimants Subsequently the Collector forwarded to the District Court a certificate issued under section 10 of the Hereditary Offices Act (Bom Act III of 1874) that the order for the payment of the compensation to the objector should be set aside in accordance with the provisions of sections 10 and 13 of the Act Thereupon the District Judge holding that he had no jurisdiction to decide whether the property was Vatan or not in the face of the Collector s certificate cancelled his order

The objector having appealed against the said order

Held restoring the award of the District Court that an award under the Land Acquisition Act (I of 1894) was not a decree or order capable of execution under the Civil Procedure Code (Act V of 1908) and was therefore not within the purview of section 10 of the Hereditary Offices Act (Bom Act III of 1874)

Held further that the award of the District Court which was the cause of the certificate made it clear that the Mahars property had been acquired by the objector by adverse possession before the commencement of the proceedings for the acquisition of the land by Government.

Per Curiam—Even if it could be said that there was any danger of the passing of the ownership by virtue or in execution of a decree or order in the Land Acquisition proceedings it could not be said that that result was arrived at without the sanction of Government who set the machinery of the Act in motion for the acquisition of the land

Nilkanth v *The Collector of Thana* (1897) 22 Bom 802 *Collector of Thana* v *Bhaskar Mahadev* (1884) 8 Bom 264 *Rachapa* v *Amingouda* (1880) 5 Bom. 283 referred to

LADDHA EBRAHIM AND CO v THE ASSISTANT COLLECTOR POONA (1910) 35 Bom 146

LAND REVENUE CODE (BOM ACT V OF 1879)—*Gujerath Talukdars Act (Bom Act VI of 1888) sec 31—Talukdari tenure*—Wanta *land (at Sarsa)—Alienated land—Attachment of income*

See GUJERATH TALUKDARS ACT 97

——— SEC 3 CL (19)—*Village of Ghatkooper*—Kowl (*lease*) *for 99 years—'Alienated village—Agricultural lease— Buildings erected by occupiers on their respective lands—Extra assessment levied by Government—Right to levy extra assessment not parted with under the* kowl] The *koul* (lease) of the village of Ghatkooper in the Thana District granted by Government on the 31st December 1845 for 99 years provided *inter alia* that the grantee should pay to Government annually a fixed sum with respect to the land which had already been under cultivation and ' that as to waste lands the grantee should bring them all into cultivation within 40 years and on the expiration of that period the full assessment according to the prevailing usage of the country should be collected annually from the grantee on such land as might be under cultivation as well as on such quantity as might remain waste out of the present waste entered in the public accounts The *kowl* further provided that In respect of the abovenamed village you (grantee) are to consider yourself as a farmer thereof You are therefore to exercise the authority vested in farmers by Chapter VI of Regulation XVII of 1827 or such as may hereafter be vested in them by any new enactment shall also be exercised by you and in the event of your acting contrary to the above said enactments you will be subject to such penalties as are now or may hereafter be provided for by Regulations

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T brought an action against the Tramway Company claiming damages for injuries sustained by him by reason of the Company s negligence T alleged that while attempting to board a stationary tram car the car was suddenly started at a signal given by the conductor and the footboard tilted and slipped sideways from beneath T s foot in consequence of which

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was the owner of a press called The Atmaram Press Beyond this, he took no part in the management of the press which was carried on by another person A book styled Ek Shloki Gita was printed at this press It was a book that dealt to a large extent with metaphysics philosophy and religion It also contained seditious passages scattered among discussions of religious matters It was not shown that the accused ever read the book or was aware of the seditious passages it contained The accused was convicted of the offence punishable under section 124A of the Indian Penal Code, 1860 as publisher of the book. On appeal —

Held by Chandavarkar J that the cumulative effect of the surrounding circumstances was such as to make it improbable that the accused had read the book or that he had known its seditious object, and that the evidence having thus been evenly balanced and equivocal a reasonable doubt arose as to the guilt of the accused the benefit of which should be given to him

Held by Heaton J., that before the accused could be convicted under section 124A of the Indian Penal Code it must be found that he had an intention of exciting disaffection and that the evidence fell very short of proving the intention

Per CHANDAVARKAR *J*—A declaration made under section 4 of the Press Act is intended by the legislature to have a certain effect namely that of fastening responsibility for the conduct of the press on a person declaring in respect of matters where public interests are involved Hence where a book complained of as seditious or libellous is printed in a press the Court performing the functions of a jury may presume that the owner had a hand in the printing and was aware of the contents and character of the book But whether such a presumption is warranted in any individual case must depend upon its own facts and circumstances The presumption however, is not conclusive it is not one of law but of fact and it is open to the accused to rebut it.

EMPEROR *v* SHANKAR SHRI KRISHNA DEV (1910) 35 Bom 55

PRINCIPAL DOUBLING OF—*Dekkhan Agriculturists Relief Act (XVII of 1879)—Wife of an agriculturist—Status—Suit by mortgagee to recover possession—Prayer for payment of principal and interest at certain rate—Decree—Payment of principal and interest—Payment of interest at certain rate till the principal is doubled—Contractual relation not superseded by the decree—Redemption suit—Accounts*

See DEKKHAN AGRICULTURISTS RELIEF ACT 204

PROMPT DOWER—*Suit for prompt dower not premature before consummation*

See MAHOMEDAN LAW 386

PROTECTION ORDER—*Presidency Towns Insolvency Act (III of 1909) sec 25—Previous decisions on applications for* interim *orders—Discretion—Practice*] It has never been the practice of Commissioners in Insolvency under the Indian Insolvent Act (11 and 12 Vic c 21) to consider themseves bound by their previous decisions on applications for *interim* orders when it has been a matter for their discretion, and it by no means follows that because an application has been refused on the first occasion it must also be refused on the second occasion

Section 25 of the Presidency Towns Insolvency Act (III of 1909) clearly intends that while an insolvent diligently performs the duties prescribed by the Act he should not be harassed by execution creditors and should not be rendered liable to pressure whereby one creditor may get undue advantage over another The section does not deprive the Court of its discretion in granting or refusing protection, but sub section (*4*) indicates clearly the lines along which that discretion should be exercised when a creditor opposes the grant. If an insolvent

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funds devoted to charity The funds amount 1 to about Rs 3 00 000 and came to th hands of the trustees from two so irces About Rs 1 00 000 was the result of appeals to var ous per ons and the rest was provided by the executors of the will of one A H The instrument declaring the trusts was engrossed on a stamp paper of Rs 15 and a que tion having arisen as to wh th r the instrument was properly stamped

Held that so far as the fund of Rs 1 00 000 was conce rned there being no previous disposition in writing of any part of it though some of the contributions were accompanied by letters from the donors expressing their wishes with respect to the funds contributed the in trument was a settlement according to the definition in section 2 (24) of the Indian Stamp Act (II of 1899) and was chargeable with duty on R 1 03 200 at the rate of 8 annas per cent

Held al o that so far as the fund of Rs 2 00 000 was concerned the provisions of the will of A H amounted to a disposition for a charitable purpose and the in trument was an appointment chargeable with a duty of Rs 15 under Schedule I Article 7 of the Indian Stamp Act (II of 1899)

In re ABDULLA HAJI DAWOOD BOWLA ORPHANAGE (1911) 35 Bom 444

STAMP ACT (II OF 1899 sec 35—*Civil Procedure Code (Act V of 1908) Order XXI Rule 91—Contract Act (IX of 1872) sec 18 cl (3)—Court sale—Discovery that the judgment d btor had no saleable interest—Failure of consideration—Suit by auction purchaser for possession or return of purchase money—Relations of the judgment creditor and auction purchaser—Suit not cognizable by Small Causes Court—Unstamped docum nt regarded as non existent*] A Court sale purchaser having discovered that the judgment debtors had no saleable interest in the property sold brought a suit against judgment creditor for recovery of possession of the property or in the alternative return of the purchase money on the footing of total failure of consideration A question having arisen as to whether the suit was maintainable

Held the suit was maintainable inasmuch as under the Civil Procedure Code (Act V of 1908) there was an implied warranty of some saleable interest when the right title and interest of the judgment debtor was put up for sale and the purchaser s right based on such implied warranty to a return under certain conditions of the purchase money which had been received by the judgment creditor was recogniz d The relations of the parties namely the judgment creditor and the Court sale purcha er were also in the nature of contract

Held, further that such a suit though the subject matter was less than Rs 500 was not cognizable by a Court of Small Causes there being a prayer for po ses ion of immoveable property

An unstamped document being inadmissible in evidence must be taken as non existent

RUSTOMJI ARDESHIR IRANI *v* VINAYAK GANGADHAR BHAT (1910) 35 Bom. 29

———————— SEC 59—*Undivided brothers—Instruments whereby co owners divide property in severalty—Release—Partition—Stamp*] Instruments whereby co owners of any property divide or agree to divide it in severalty are instruments of partition

One of three undivided brothers agreed to take from the eldest brother the manager of the family as his share in the family prop rty, mov able and immoveable a certain cash and bonds for debts due to the family and passed to the eldest brother a document in th form of a release

Subs quently one of the two brothers passed to the eldest brother a document in the form of a release whereby he and the elde t brother divided the remaining family property by the latter handing over to the former securities for money

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On the 6th of November 1903 the defendants opened a place of business in Bombay and issued a circular dated February 1909 in which on behalf of the defendant Company they referred to the plaintiffs as the defendants agents who had sold 600,000 watches made at the St Imier Factory in past years and proclaimed that Berna Company's watches would no longer be sold by their former sole agents importers (meaning the plaintiffs) as the defendants had decided to get rid of any middleship and to deal directly themselves

The plaintiffs thereupon filed a suit on the 2nd April 1909 against the defendants to restrain them from using and imitating various trade symbols alleged to belong to the plaintiffs and from representing that the defendants business was the business carried on by the plaintiff

Held that the plaintiffs for the last three years both in their dealings with the supplying factory and with their customers evinced very clearly and consistently their intention to abandon the name Berna as a quality mark for their watches and it followed that they could no longer claim any exclusive title to the use of that name either alone or in a trade mark

Held further that the plaintiffs were entitled to an injunction restraining the defendants their servants agents travellers and representatives respectively, from in any manner representing that the defendant Company had been or were carrying on the business carried on by the plaintiffs or were the successors in business of the plaintiffs

Per Curiam —The importer who by advertising and pushing the sale of goods under a particular mark secures a wide popularity for the mark in relation to the goods sold by him is entitled to the protection of the Court for that mark in the country of importation even against the producer of the goods *Damodar Ruttonsey* v *Hormasji Adaji* (un rep) Appeal No 942 of 1895 and *Lavergne* v *Hooper* (1884) 8 Mad 149 referred to

The fact that the user of a word or mark always uses it in conjunction with his own name is not conclusive to show that the word or mark cannot be claimed as a trade mark or that the user has waived his rights in it as a trade mark

The question of abandonment is one of intention to be inferred from the facts of the case *Mouson & Co* v *Boehm* (1884) 26 Ch D 398 and *Lavergne* v *Hooper* (1884) 8 Mad 149 followed

The practice of raising a number of issues which do not state the main questions in the suit but only various subsidiary matters of fact upon which there is not agreement between the parties is very embarrassing Issues should be confined to questions of law arising on the pleadings and such questions of fact as it would be necessary for the judge to frame for decision by the jury in a jury trial at *nisi prius* in England

WEST END WATCH COMPANY *v* BERNA WATCH COMPANY (1910) 35 Bom 425

TRANSFER OF PROPERTY ACT (IV OF 1882) SEC 2 (*d*)—*Mortgage*—*Assignment of mortgage*—*Application of rule of dam dupat*] The fact that the person entitled to sue on a mortgage happens by assignment to be a Parsee cannot affect the (Hindu) mortgagor's right to claim the advantage of the rule of damdupat if it existed when the mortgage was entered into

It is not proper to infer that because it has been expressly enacted that nothing in Chapter II of the Transfer of Property Act (IV of 1882) shall be deemed to affect any rule of Hindu Law, the Legislature has deprived a Hindu mortgagor of the protection afforded him by the rule of damdupat.

The right of a mortgagee to sue for his principal and interest is a right arising from a contract and must be taken to be made subject to the usages and customs of the contracting parties

JEEWANBAI *v* MANORDAS (1910) 35 Bom. 199

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THE

INDIAN LAW REPORTS,

Bombay Series

APPELLATE CIVIL

Before Sir Basil Scott Kt, Chief Justice and Mr Justice Batchelor

GANPATRAO BALKRISHNA BHIDE (ORIGINAL DEFENDANT) APPELLANT v HIS HIGHNESS THE MAHARAJA MADHAVRAO SINDE SARKAR ALIJA BAHADUR, G C S I (ORIGINAL PLAINTIFF) RESPONDENT * — 1910 July 6

Deposit of money—Stakeholder—Valid assignment by depositor to his creditor —Neglect of the creditor to recover—Creditor chargeable with the amount

Where money deposited with a stakeholder was validly assigned by the depositor to his creditor in satisfaction of his debt and the creditor being able to recover the amount so assigned, neglected to do so he was chargeable with the amount

FIRST appeal from the decision of Rattonji Mancherji, First Class Subordinate Judge of Poona, in original suit No 359 of 1902

The plaintiff, His Highness the Maharaja Madhavrao Sinde Sarkar of Gwalior, sued to recover from the defendant Rs 4 178 7 2 and for account and damages The suit was filed on the 22nd October 1902 The plaint alleged that the defendant was plaintiff's Vakeel (agent) at Poona and was as such in management of the plaintiff's Inam, Patelki Vatans and proprietary lands in the Poona, Ahmednagar, Sholapur and Nasik Districts, that the defendant was appointed plaintiff's Vakeel on the 28th January 1897, and on the 2nd February next he took over charge from his predecessor that subsequently the defendant being dismissed he was directed on the 2nd November

* First Appeal No 90 of 1907

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1901 to deliver over charge of the cash balance, papers and dead stock to his successor, one Parchure, that the defendant accordingly delivered over charge on two dates, namely, the 9th December 1901 and the 12th July 1902, but on both the occasions he failed to deliver over the account to his successor, he did not properly explain how he had disbursed the various sums that had come to his hands, and the plaintiff was therefore obliged to make the account as far as it was possible from *Goshawaras* (abstracts of accounts) the defendant had sent to him from time to time, and that the suit was filed on the basis of the account so made Out of the amount which the plaintiff sought to recover from the defendant the item of Rs 3,136 15 11 was strenuously contested

The defendant answered that (1) when the plaintiff appointed him as Vakeel, he deposited Rs 3,000 with Shrimant Gopalrao Vithal *alias* Bhaiya Saheb Apte, First Class Sardar of Gwalior, at the direction of the Maharaja (plaintiff) himself, and when he gave over charge to the plaintiff's present Vakeel, he gave to the said Vakeel with his consent a "cheque" (letter) to recover the balance due from the said deposit of Rs 3 000 and the plaintiff accepted the 'cheque" and passed receipt in his favour, therefore, the present suit would not lie, (2) he was unable to give a detailed reply with respect to the various items claimed unless he was permitted to see the papers which he handed over to the plaintiff, (3) he was not guilty of negligence or default in the discharge of his duties as plaintiff's Vakeel, he did everything after having obtained the previous sanction of the plaintiff and discharged his duties honestly and diligently, (4) and that it was not explained in the plaint by what act or omission, he occasioned the loss or damage, claimed by the plaintiff

At the hearing the Subordinate Judge framed nine issues, and while the suit was pending the parties put in a joint application on the 18th March 1905, stating that the dispute between the parties had been compromised and asking for the withdrawal of the suit This was allowed On the 4th April 1905 the plaintiff's pleader applied for a review of the above order on the ground that he had consented to the withdrawal of the suit upon the strength of telegraphic messages which were

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subsequently found out to be bogus and fictitious and not emanating from the plaintiff Maharaja or his responsible officers On the 15th July 1905 the Subordinate Judge passed an order restoring the suit to the file

The defendant appealed against the said order but the appeal was rejected The High Court, however, in disposing of the appeal directed the Subordinate Judge to take evidence and inquire into the question whether the suit had been properly and validly compromised and to decide it along with the other questions involved in the case

The Subordinate Judge accordingly added a tenth issue to the nine already framed at the original trial On the first, seventh, eighth and tenth issues, the findings of the Subordinate Judge were as follows —

(1) The plaintiff was entitled to recover Rs 3,901-14 6

(7) The deposit of Rs 3,000 was not made by the defendant with Gopalrao *alias* Bhaiya Saheb Apte at the desire of the Maharaja

(8) The defendant was not entitled to set off that amount against such amount as might be found due from him to the plaintiff

(10) The suit was not properly and validly compromised

The Subordinate Judge passed his decree in the following terms —

Decree for the plaintiff for Rs 3 901 14 6 which he do recover from the defendant The defendant is also hereby ordered to hand over to the plaintiff the kirds and khatavanis for the years he was in office as plaintiff's Vakeel or in default to pay him Rs 5 by way of damages It is but just and proper that the defendant should pay his own costs and those of the plaintiff to the extent of the claim decreed

The defendant having appealed the High Court on the 3rd September 1908 recorded the following interlocutory judgment —

SCOTT, C J —The principal point in this appeal is, whether the appellant was entitled to claim that the debt, due by him to the respondent, at the time when he relinquished the agency at the end of 1901, has been satisfied

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The way in which the point was taken in the written statement was, that there had been a payment by cheque, reliance being placed upon a letter, dated the 9th of December 1901 (exhibit 127) The expression "cheque" is obviously a misdescription, but the real question which arises with reference to that document is, whether the letter does not amount to an equitable assignment of the money held in deposit on account of the plaintiff by Gopalrao Apte, whether, in other words, it is not a transfer of an actionable claim within the meaning of section 130 of the Transfer of Property Act If it be held to be a transfer of an actionable claim, the next question which arises is, whether it was accepted by the plaintiff's agents as an absolute or a conditional satisfaction of the claim of the Maharaja for the cash balance shown to be in the hands of the defendant at the time of his relinquishing his agency, and secondly, whether those agents had any authority, express or implied, to accept such transfer in satisfaction, conditional or otherwise, of that claim In deciding the question of implied authority one consideration which will arise is the object for which the deposit was held by Apte, if it was held for the purpose of meeting such a claim as was preferred by the Maharaja against his agent, the presumption of implied authority will be strong

The further question, which still arises if the acceptance and the authority are established is, whether notwithstanding that the deposit money has not in fact been recovered by the Maharaja s agents from Apte, the Maharaja or his agents have not so conducted themselves by neglect or omission as to be estopped from contending that the claim against the defendant in respect of the balance in his hands has not been satisfied by the assignment of his claim against Apte

None of these questions have been argued in the lower Court, but they are, in our opinion, questions the determination of which is essential to the right decision of the suit upon the merits and we therefore frame the following issues —

(1) Was there a transfer of an actionable claim against Apte by the letter of the 9th December 1901, exhibit 127?

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(2) If so did the plaintiff or his agents accept the same in conditional or absolute satisfaction *pro tanto* of the claim for cash balance against the defendant?

(3) If the transfer was so accepted by the agents, had they authority express or implied from the plaintiff so to do?

(4) If so, whether the plaintiff or his agents have so conducted themselves by omission or neglect as to estop the plaintiff from contending that the claim for cash balance has not been satisfied by the transfer?

In considering the last issue the Subordinate Judge should refer to the case of *Peacock v Purssell*[1]

The Court should take such additional evidence as may be tendered upon these issues and return its findings thereon together with the evidence within four months

On the first issue the Subordinate Judge recorded a negative finding and gave no findings on the remaining issues

The appeal then came on for argument before Scott, C J, and Batchelor, J

P D Bhide for the appellant (defendant) —

The lower Court erred in holding that the deposit was not made at the desire of the Maharaja plaintiff Exhibit 184 is clear on the point Gopalrao Apte acknowledges therein that the amount was kept with him as security for the proper discharge of our duties Further, in exhibit 129 he says that the money was deposited with him at the instance of the Maharaja This was at least the understanding between ourselves and Apte In exhibits 130 and 150 we say that the money was deposited at the direction of the Maharaja Moreover, the acceptance by Parchure shows that it was a deposit at the instance of the Maharaja, otherwise he would not have received our letter to Apte, exhibit 129, and would not have taken from us the charge of the office Further, Parchure inquired by wire of Apte and having received a reply from him accepted the letter of assignment, exhibit 127 We assigned over the money which Apte held for us to the plaintiff who never made a demand on

(1) (1863) 32 L J C P 266

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Apte It is not necessary that any particular form of expression should be used to create an assignment *Buck* v *Robson*[1], *In re Whitting*[2] If transfer can be implied, it is quite sufficient according to law section 130 of Transfer of Property Act We therefore contend that there was a transfer by us of an actionable claim

D A Khare with *G H Kulkarni* for the respondent (plaintiff)

SCOTT, C J —This is a suit to recover from the defendant Rs 4,178 7-2 in respect of moneys alleged to be due by him to the plaintiff on relinquishing his agency of the plaintiff's Deccan Estates

The plaintiff is the Maharaja Scindia of Gwalior who has Inam and Patilki Vatans and other lands in the Bombay Presidency and entrusts supervision of them to an agent at Poona

On the 28th of January 1897 the defendant was appointed the plaintiff's agent and took over charge on the 2nd of February in that year He was dismissed towards the end of 1901, and on 9th of December in that year gave over charge of his office to Parchure, the plaintiff's agent at the date of the filing of the suit

The most important item of claim relates to a cash balance of Rs 3,136 15 4 which, according to the accounts furnished by the defendant to the new agent, was in his hands on the 9th of December

The defendant pleads that when the plaintiff appointed him as agent, he the defendant deposited Rs 3,000 as security with Shrimant Gopalrao Vithal Saheb Apte, a First Class Sardar of Gwalior, at the direction of the plaintiff himself, and when he gave over charge to the new agent he gave to him a letter to recover the balance due out of the said deposit, and the plaintiff accepted the letter and passed a receipt in his favour

The material issues raised in the lower Court with reference to this claim are, the 1st 7th and 8th issues —

(1) " Does the plaintiff prove that all or any of the sums aggregating Rs 4,178 7 2 are due to him from the defendant ? "

(1) (1878) 3 Q B D 686 (2) (1878) 10 Ch D 615

(7) "Has the defendant deposited Rs 3,000 with Sardar Gopalrao Vithal at the desire of his master when he was first appointed Vakeel?"

(8) "If so, is defendant entitled to set off that amount against such amount as may be found due from him to the plaintiff?"

The hearing of the case was very much delayed by an order of dismissal upon allegations of a compromise, which subsequently proved to be incorrect, and the suit was then restored and tried by the direction of this Court It has now been disposed of by the Subordinate Judge, who has passed a decree for the plaintiff for the principal sum claimed, together with the other smaller sums

The case has, however, been tried on very unsatisfactory materials for, the plaintiff relying upon his sovereign rights, has declined to answer some very pertinent interrogatories administered to him by the defendant as to interviews alleged to have taken place between them On the other hand, the defendant apparently hoping to the last for a settlement with the plaintiff, gave very meagre evidence The alleged depositary Gopalrao Vithal Saheb Apte was not examined in the earlier stages of the suit, and at the time when the completion of the trial had been directed by the High Court, was dead The question at issue has therefore to be decided chiefly upon documentary evidence It appears that on the 9th of December 1901, when the defendant handed over charge to the new agent, a memorandum was prepared of the property handed over which stated that the balance in the defendant's hands found due to the end of Samvat 1957 was Rs 2,982-15 11, and had been handed over This memorandum was endorsed by Parchure It is not pretended by the defendant that the balance was handed over in cash It is however admitted that a letter dated the 9th of Decembar 1901 addressed to Kunte, the head of the Mafi Office of the plaintiff at Gwalior, and signed by the defendant (exhibit 127), was handed to Parchure stating that the defendant had handed over charge and got a receipt, and that steps should be taken to recover the 'Rs 2,982 15-11, being the amount of the balance with the defendant from his money kept in reserve by Scindia Sarkar with Gopalrao Vithal Apte

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for the due discharge of the functions of his office, and that a letter had also been sent to Apte This was forwarded to the Mafi Office on the 10th of December 1901 along with the memo above referred to bearing Parchure's endorsement

In proof of the deposit with Apte, the defendant produces a document signed by Apte, from which it appears that from October 1895 to October 1897, money of the defendant had been lying at interest with Apte, and that on the 13th October 1898, the date of the document, there was due for principal, interest and kosha Rs 3,017 14 0, and that it was agreed that that sum should remain as the defendant's deposit as long as the office of Vakeel was continued in relation thereto without interest accruing thereon

The documents in which the defendant refers to this deposit are all consistent with each other In exhibit 127, the letter of assignment, he speaks of the money as his rupees kept in reserve by Scinde Sarkar with Apte for the due discharge of the functions of his office In exhibit 131 he says that the amount due from him should be recovered by the Sarkar from Apte as the cash balance in connection with the office of Vakeel deposited as *Thev* In exhibit 150 dated July 1902 the defendant writing to Apte speaks of the rupees as having been secured with Apte by way of security on an oral order from the Sarkar

Apte's only letter upon the subject, exhibit 129 of the 11th of June 1902, states that when the defendant obtained the appointment as the plaintiff's Vakeel it was agreed that the money should be kept by Apte by way of security, and that the Maharaja had sent him an order to call on the defendant to pay the balance due to the Maharaja which, having been done, the defendant had forwarded Parchure's receipt which Apte had sent on to the Maharaja, asking for directions as to the return of the defendant's money detained with Apte by way of security

There is no oral evidence whatever touching the circumstances under which the deposit was made The defendant merely says he paid Parchure by cheque on Apte, and not in cash The Maharaja has declined to answer the interrogatories administered to him on the subject Apte died in 1905 without having been

examined, and his son, who was examined on interrogatories, denies that any deposit was made with his father Parchure alleges that when the defendant gave him the letter on the 9th of December 1901, he said he had Rs 3,000 in deposit with Apte as security for his having stood surety for him

The learned Judge held that it was proved by the acknowledgment, exhibit 184, that Apte held Rs 3,017 14 0 in deposit for the plaintiff and was to retain the same in his custody as long as the defendant occupied the position of the plaintiff's Vakeel, and that, as stated in Apte's letter of the 11th of June, it was agreed when the defendant obtained employment with the plaintiff, to hold the sum which was already in deposit with Apte as security

He takes the view however that the money was held by Apte for his own security as the guarantor of the fidelity of defendant, and that the deposit was not made at the plaintiff's desire, or with his cognizance, or knowledge

He says that Parchure was simple enough to accept exhibit 127 in payment of the cash balance, though neither he nor the Mah officer could have any legal right upon the letter to enforce the demand against Apte, if he declined to comply with it

Now the money held by Apte was, either (1) a deposit creating an actionable claim of the defendant transferable by him for any purpose, or (2) money held by Apte on account of defendant and the plaintiff as security for the defendant's fidelity in his agency, and applicable to answer any failure by him to account, *or (3) money held by Apte for his own personal security against* any claim, which might be made by the plaintiff against him as guarantor for the defendant's fidelity In case (3) the defendant would not be entitled to claim the money from Apte till the latter had been freed from his liability under his guarantee, nor would the amount of the deposit be material to the plaintiff, as Apte's liability would be personal and unlimited

In case (2) the deposit would be held with the plaintiff's cognizance as security, and Apte would be a mere stakeholder bound to pay it, in any manner agreed upon by defendant and plaintiff

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The two documents signed by Apte which relate to this deposit are inconsistent with the theory which found favour with the learned Judge There is no suggestion in exhibit 184 of any personal liability on the part of Apte for the behaviour of the defendant, while Apte's letter of the 11th June 1902 (exhibit 129) points strongly to the conclusion that he held the deposit at the orders and with the approval of the plaintiff, and was willing to pay it back to the defendant, if the plaintiff permitted him to do so This view is supported by the reference by defendant in exhibit 127 to Scindia Sarkar in exhibit 150 to the 'oral order' from the Sarkar

Either in this view of the case or in the first alternative of an actionable claim, the defendant, by directing the plaintiff's servants to apply virtually the whole of the deposit in satisfaction of the balance due on the agency account and by giving notice of this direction to Apte, had put it out of his power to deal with the deposit in any way, and had passed the property therein to the plaintiff

After receiving Apte's evasive letter of the 11th June 1902, the defendant wrote to him again on 19th July 1902 (exhibit 150), requesting him to pay over the deposit at once on demand from plaintiff's Mafi Office, and stating, that the money had been lodged by way of security on a verbal order of the plaintiff

This letter was given by defendant to plaintiff's agent Parchure, with an endorsement in the following terms "The above mentioned letter should be shown to Apte Saheb, and he should be informed to pay the rupees And I should be favoured by communicating to me his reply in writing as to what he has to say You should show this letter to him through the Mafi Office Then he will certainly pay the rupees"

It appears from exhibit 128, that the Mafi Office thereafter wrote to Parchure saying, that Apte said the deposit was held on account of a private matter between him and the defendant, but the defendant does not appear ever to have been informed of this reply

In October 1902 this suit was filed, ignoring the efforts made by the defendant to have the deposit money applied in payment of the balance due

When, at the hearing of the appeal, the case was discussed from the point of view of the letter of the 9th December 1901, being an assignment of an actionable claim, the plaintiff's pleader suggested that the case should be remanded as the plaintiff might be able to adduce further evidence on the point In view of the scanty evidence on the record, we acceded to this suggestion, framing issues, to draw the attention of the lower Court and the parties, to the points arising for consideration The plaintiff however, notwithstanding an ample allowance of time, has adduced no further evidence, and the defendant has examined 3 witnesses who carry the case no further The learned Judge appears from his judgment on remand, to have failed to appreciate the points remitted to him for consideration, and the bearing of the documentary evidence upon them If we draw presumptions against the plaintiff, it is not without having given him an opportunity of clearing up all matters appearing in evidence against him

It is clear that, if Apte had the money, it could and should have been recovered from him His letter of the 11th June 1902 shows he had the money, and had been in communication with the plaintiff about it and had offered to pay to the defendant if permitted to do so by the plaintiff He would, therefore have had no answer to a claim by the plaintiff fortified by the defendant's letter of assignment Apte was a Gwalior Sardar resident within the jurisdiction of the plaintiff's Courts, and the plaintiff cannot be permitted to shield him from liability at the expense of the defendant, who has in consideration of money due by him, assigned to the plaintiff his property in the deposit One of the interrogatories administered by the defendant to Apte's son, was as follows —"Were you ever called upon till now to pay the aforesaid sum by the Sarkar?" The answer given on the 24th October 1806 was 'Never was the demand made'

It is a well recognised principle that, where a creditor has the control of a security, he is chargeable with what he might

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have received from it but for his wilful default See *Williams* v *Price*[1], *Mayer* v *Murray*[2], *Peacock* v *Pursell*[3], *Iglesias* v *The Mercantile Bank of the River Plate*[4]

On the ground that the money mentioned in exhibit 184 was held by Apte as a stakeholder, and was validly assigned by the defendant to the plaintiff in satisfaction of the balance due on the agency account, being the purpose for which it was agreed to be held by Apte, and that the plaintiff being able to recover the amount so assigned, neglected to do so, we are of opinion, that he is chargeable with the amount We, therefore, find on the 7th and 8th issues, in favour of the defendant

With regard to the remaining items decided in the lower Court against defendant, we do not think, there is any ground for disturbing that decision Costs throughout payable in proportion to the success of the parties

Decree varied

G B R

(1) (1824) 1 S and S 581
(2) (1878) 8 Ch D 424
(3) (1863) 32 L J C P 266
(4) (1878) 3 C P D 350

APPELLATE CIVIL

Before Mr Justice Chandavarkar and Mr Justice Heaton

1910 *July 8*

CHUNILAL SON AND HEIR OF ISHWARLAL BHOGIDAS (ORIGINAL PLAINTIFF), APPELLANT v THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT) RESPONDENT*

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL PLAINTIFF), APPELLANT v CHUNILAL SON AND HEIR OF ISHWARLAL BHOGILAL (ORIGINAL DEFENDANT), RESPONDENT*

Maxim—Actio personalis moritur cum per ona—*Maxim applies to actions in tort—No application to actions where contractual obligation implied by law—Government—Employment of shroff to accept Babashai coins—Shroff accepting Shikkai coins instead—The coins accepted by Mint officers—Loss to Government—Measure of damages—Acquiescence or ratification by Government*

On the occasion of calling in the Babashai coins from the British villages in the Kaira District, the plaintiff was employed by Government as a shroff to

* Joint Appeals Nos 38 and 42 of 1908

examine and accept the Babashai coins only The plaintiff worked for about a month during which period he passed 12 170 Shikkai coins as Babashai coins At that date the Shikkai coins were not current and had only bullion value The coins were finally sent to H M s Mint where they were melted Government alleged that by the shroff s neglect in accepting Shikkai coins they suffered a loss of Rs 1,758 15 1, which they asked the shroff to pay The shroff paid R 1 095 To recover the remaining Rs 663 15 1 Government filed a suit against the shroff The shroff also filed a counter suit against Government to recover Rs 1 095 which he alleged were wrongfully recovered from him Both suits were heard together The District Judge dismissed both suits holding that Government had suffered a loss by the shroff s action but it was compensated by the money already paid by the shroff Against this decision both parties appealed While the appeals were pending in the High Court, the shroff died and his son was brought on the record as his legal representative —

Held that the maxim *actio personalis moritur cum persona* did not apply to the case, as there was an obligation implied by law The shroff undertook to pass only Babashai coins and it was an implied term of that contract that if he passed any other and Government suffered loss he should make it good (section 211 of the Indian Contract Act 1872)

Held further that the fact that Government had kept and had the benefit of Shikkai coins was not sufficient by itself to raise any presumption of either estoppel or acquiescence or ratification on the part of Government

Held, also that the action of the Mint officers in accepting the Shikkai coins could bind Government only so far as they had derived benefit from the action of the Mint officers that that benefit made them liable only so far that it was to be taken into account in measuring the damages for the loss sustained by Government in consequence of the shroff s deviation from the directions given to him and the purpose of his employment

Held, therefore that in estimating the loss suffered by Government owing to the shroff s action the bullion value of the Shikkai coins must be taken into account for they had on the date they were accepted ceased to be current coin.

It is a principle that nominal damages are awarded only where there is failure to prove any appreciable damage in fact

JOINT appeals from the decision of Dayaram Gidumal, District Judge of Ahmedabad

Ishwardas Bhogidas the defendant in one suit and plaintiff in the other, was employed by Government at their sub treasury at Nadiad, to examine and pass the Babashai coins that might be brought to the treasury The Babashai coins were called in by Government and they were exchanged at the rate of 130

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Babashai coins for every 100 British rupees Ishwardas, the shroff, was employed to examine and see that none except Babashai coins were accepted at the treasury The shroff was employed for about a month It was found that during this period, he had allowed to be accepted at the treasury 12,170 Shikkai coins

The Shikkai coins were at one time the current coin in that part of the country, but they had long ceased to be current and on the dates in question they had only bullion value which was Rs 62-7 6 for every 100 Shikkai coins The coins in question were finally sent to His Majesty's Mint where they were accepted by the Mint officers At the period in question the value of 100 Babashai coins was Rs 76 14 9 Thus, in having Shikkai coins instead of Babashai, Government suffered a loss of Rs 14-7 3 for every 100 Shikkai coins accepted by the shroff The loss on the 12,170 Shikkai rupees amounted to Rs 1,758 15 1

The Government then asked the shroff to recoup the loss which they had sustained by the action of the shroff He paid Rs 1,095 in satisfaction of the claim The remaining Rs 665 15 1 were still demanded by Government, to recover which they filed a suit against the shroff The shroff contended in that suit *inter alia* that he was ready and willing to exchange the Shikkai coins for the Babashai coins, and that Government suffered no loss by his action for, they melted both Babashai and Shikkai coins and the latter yielded more silver than the former Subsequently, the shroff also filed a suit against Government to recover Rs 1,095 which he alleged were wrongfully recovered from him

The District Judge heard both suits together and disposed of them by one judgment He dismissed both suits holding that the loss to Government had been assessed at 9 per cent, which was covered by the amount paid in by the shroff His reasons were as follows —

"The suit is based on a contract not on a tort Damages are claimed not on account of a fraud but on account of a breach of contract Now the breach took place in January and February and it has not been satisfactorily proved

that in those months Shikkais were worth less than the defendants, who purchased privately paid for them The learned Government Pleader wanted me to assess the damages on a different principle He contended that when the fraud was discovered the Shikkais were only worth their bullion value and, therefore damages should be awarded at the rate claimed But it has not been even satisfactorily proved that on that date Shikkais were worth only their bullion value They were good for hoarding and the Government Pleader himself admitted that some people bought Shikkais as auspicious coins I do not consider the evidence sufficient for holding that when the breach of duty took place the Shikkais were worth more than the value fixed under Mr Bamanji s order Mr Bamanji himself was under the impression that Government was not entitled to recover more than 9 per cent and it has not been pressed that as a matter of fact the Shikkais were worth less than the price paid by the defendant and Government has sustained a greater loss '

The Government as well as the shroff appealed to the High Court

Whilst the appeal was pending, the shroff Ishwardas died His son Chunilal was thereupon brought on the record as his legal representative

L A Shah, for the shroff —In appeal by the shroff —

As the Shikkai coins were retained by the Mint authorities, we are absolved from liability At the most, there is a technical breach of contract and under section 211 of the Indian Contract Act, 1872, Government can only claim nominal damages See *The Maneckji Petit Manufacturing Company, Limited* v *The Mahalaxmi Spinning and Weaving Company, Limited*(1) and Mayne on Damages, p 633 Government have in fact suffered no loss for, they used both Babashai and Shikkai coins for melting into silver and the latter yielded more silver than the former

In appeal by Government —This is a case of personal action the shroff having been engaged for his personal skill The shroff having died, the action does not survive against his heir and legal representative See Broom's Legal Maxims, pp 683, 684, and *Haridas Ramdas* v *Ramdas Mathuradas*(2)

G S Rao, Government Pleader, for the Secretary of State —

The shroff was engaged only to pass Babashai coins, there was therefore an implied contract between him and Government

(1) (1895) 20 Bom 61. (2) (1889) 13 Bom 677

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that he was to accept Babashai coins and none else When he accepted Shikkai coins he clearly committed a breach of contract The mere fact that the Mint officers retained the coins does not exonerate him from liability There was no acquiescence or ratification on the part of Government, nor was there any estoppel As to the measure of damages the Government had to pay for the Shikkai coins, the artificial high value fixed for the Babashai coins, whereas they had only then bullion value, the loss caused is the difference between the two values The maxim *actio personalis*, etc does not apply to cases of contract and to actions for damages in respect of wrong done to the property See Broom's Legal Maxims p 613, *Morgan* v *Ravey*[1], *Blyth* v *Hadgate*[2], *Batthyany* v *Walford*[3]

CHANDAVARKAR, J —In Appeal No 38 of 1908, the learned District Judge's finding that the appellant was employed by Government as shroff to examine and pass only *Babashai* silver coins and not to accept Shikkai coins, has not been made the subject of any convincing argument But it is urged that the right of Government to complain that the appellant as their agent has acted contrary to the directions given to him and the purpose of his employment is lost by reason of their conduct in keeping the Shikkai coins, instead of returning them to the appellant, and in allowing without objection such coins to be remitted to the Mint This defence, if it means anything, must amount to a plea of estoppel, acquiescence, ratification or novation, that is a new contract of agency, barring the right of Government to claim damages from the appellant on the specific contract of agency on which the action was founded In the Court below, no such defence was set up in the pleadings, unless we are to understand the 3rd issue as covering them But it cannot be so understood That issue merely raised the question whether the appellant was misled by the action of the Revenue authorities in reference to the coins in such a way as to exonerate him from responsibility Assuming that the pleas in question did arise on the issue, the evidence falls far short of what the law requires to sustain them

(1) (1861) 6 H & N 265 (2) (1891) 1 Ch 337, 366.
(3) (1887) 36 Ch D 269, 279

The appellant was employed as an expert to pass Babashai silver coins only If he passed other coins, the fact that his employer appointed others, such as appraisers at the Mint, and the Mamlatdar, and the Aval Karkun at the sub treasury at Nadiad, to see whether the appellant did his duty according to the directions, and that those others allowed Shikkai coins to be passed by him, cannot relieve him from his duty as agent There was no contract between him and Government that he should be held to have fulfilled his duty, if other servants employed by them to inspect his work allowed him to depart from directions given to him As for the fact that Government have kept and had the benefit of the Shikkai coins, that by itself raises no presumption of either estoppel or ratification The directions given to the appellant when he was employed were specific, he was to pass Babashai silver coins only That was his duty, irrespective of supervision or inspection If he, or any other person similarly employed, remitted other coins and the Mint officers kept and used them for Government, it cannot be said either that Government caused the appellant intentionally to believe and to act upon the belief that their specific directions were modified by them, and that the original purpose of the agency was changed or that they acquiesced in or ratified the appellant's acts Ratification and acquiescence mean a full knowledge of the facts The Mint officers were agents of Government to receive Babashai coin, they were not agents to contract for and on their behalf in the matter Their action cannot bind Government except so far as Government have derived benefit from the action of the Mint officers That benefit makes them liable only so far that it is to be taken into account in measuring the damages for the loss sustained by Government in consequence of the appellant's deviation from the directions given to him and the purpose of his employment

The next question is as to the measure of damages The lower Court has taken as the measure the difference between the price actually paid by Government for the Shikkai coins (Rs 100 for 130 Shikkais as if they were Babashai) and their market value Calculating the damages on this principle the lower Court has held that the amount paid by the

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appellant to Government under protest fully represented the loss incurred by them owing to his breach of the contract of agency The appellant seeks by his claim to recover a portion of that amount on the ground that Government, having retained and made use of the Shikkai coins, are entitled only to nominal damages This contention ignores the principle that nominal damages are allowed only where there is failure to prove any appreciable damage in fact That cannot be said to have been the case here For the Shikkai coins which were let in by the appellant in breach of his duty, Government paid at a certain rate and had to suffer actual loss in money That is found by the Court below and we have heard no argument against that finding It is a question whether the lower Court is right in estimating that loss sustained by Government by the difference between what Government paid for the coins and their market value That question is raised by Government in their Appeal (No 48 of 1900) from the decree in the suit brought by them against the present appellant Ishwardas But the question does not arise in this appeal

On these grounds the decree in Appeal No 38 of 1908 must be amended as to costs which are to be paid by the appellant In other respects the decree must be confirmed with costs

Dealing now with Appeal No 42 of 1908, it arises out of a suit brought by the Secretary of St te for India in Council to recover from the defendant Ishwardas Bhogidas a certain amount as representing the loss caused by him by passing a certain number of Shikkai coins as genuine Babashais, contrary to his contract of agency with Government The defendant had paid to Government under protest a sum in satisfaction of the loss, but Government claimed more and filed the suit

The lower Court disallowed the claim on the ground that the sum paid by the defendant under protest fully represented the loss

After Government had preferred this appeal from the lower Court s decree, the defendant (respondent) Ishwardas Bhogidas died, and his legal representative was brought on the record in his place

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A preliminary objection to the hearing of the appeal is raised on the ground that the action being of a personal character, does not survive owing to the death of the original defendant, Ishwardas Bhogidas, according to the maxim "*actio personalis moritur cum persona*"

"The application of that maxim is limited to actions in which remedy is sought for a tort or for something which involves at any rate, the notion of wrong doing" per Lord Macnaghten in *The United Collieries Ld* v *Simpson*[1] But it does not apply to actions in which compensation is claimed for injury to property on the strength of an express or implied contract *Phillips* v *Homfray*[2] "It is not only where there is an express contract that a suit grounded on some default of the person whose representative is sued can be maintained, but if the position of the parties was such that the law of England would imply a contract from that position, then on *assumpsit* the executor might still be held liable There are many cases where an action can be brought upon an obligation implied by law in consequence of the position which the parties have undertaken to one another" *Batthyany* v *Walford*[3] See also *Bunbury* v *Hewson*[4]

The present is one of such cases, because here the defendant Ishwardas undertook to pass only Babashai coins It was an implied term of that contract that, if he passed any other and Government suffered loss he should make it good (Section 211 of the Indian Contract Act) Government complain and have proved that, owing to his default they have been out of pocket inasmuch as they had to pay in their own currency for Shikkai, instead of Babashai coins The injury complained of is to their personal estate, and the action is one on *assumpsit*, since the defendant, by the term of his employment annexed by law to the contract agreed to indemnify Government for the loss

The action, therefore, survives The next question in this appeal is whether damages have been estimated by the lower Court on a correct principle That Court has held that Govern-

(1) (1909) A C 383 at p 391
(2) (1883) 24 Ch D 439
(3) (1887) 36 Ch. D 269
(4) (1849) 3 Exch 558

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ment are entitled to damages being the difference between the money they paid actually, (100 for 130 Shikkai coins as if they were Babishais) and the market value of the Shikkai coins at the date of the remittance of the latter to the Mint Government object to the market value being taken into account and contend, that only the bullion value of the Shikkai coins must be deducted The principle adopted by the lower Court treats the transaction as one between vendor and vendee, not as between principal and agent In *Cassaboglou v Gibbs*[1] the plaintiff appointed defendant as his agent to select opium of a certain description, the defendant selected and sent opium of a different description part of which the plaintiff sold The plaintiff sued the defendant for loss and claimed damages on the footing of the difference between the market price of the article ordered and the proceeds of the sale of the drug actually sent But it was held that he could not so claim and treat his agent as vendor of the opium to him, and that all the plaintiff was entitled to was the actual loss and damage sustained by him through the defendant's negligence and breach of duty In the present case the Shikkai coins had ceased to be a legal tender, and the evidence adduced by the respondent to show that people were buying them in market is not satisfactory The evidence adduced for Government to prove that the market rates relied upon by the respondent were inflated and fictitious is not contradicted, and the experts examined state that since Shikkai ceased to be a legal tender, its price has been reckoned according to the bullion value (see Exhibits 116 and 69)

The other appeals by Government follow suit

The result is —

Appeal No 38 of 1908 Decree amended as to costs which are to be paid by the appellant In other respects confirmed with costs

Appeal No 55 of 1908 Do do

Appeal No 44, 45 and 47 of 1908 Decree reversed and claim awarded with costs throughout

(1) (1882) 9 Q B D 220

Appeal No 42, 43 and 46 of 1908 Decree reversed and claim awarded with costs throughout against the legal representative of the deceased defendant in each suit to the extent of the assets received and not duly accounted for

In Appeal No 43 of 1908 the decree is also against defendant No 2

HEATON, J —*In a series of suits the Secretary of State for India* in Council claimed against certain shroffs for damages for breach of a duty they had contracted to perform Briefly stated, the facts are the e on the occasion of the substitution of British Indian for Baroda Babashai rupees, the Government treasuries undertook to accept all genuine Babashai rupees at the rate of 100 British Indian for 130 Babashai The defendant shroffs were employed at the treasuries to scrutinize the coins offered and to pass only genuine Babashai As a fact they passed large numbers of Shikkai rupees, and thereby, it is alleged, caused a loss to the Secretary of State for India in Council Subsequently the shroffs paid certain sums by way of damages, but the Secretary of State, deeming the amounts so paid insufficient, has sued to recover further damages The shroffs sued separately to recover what they had paid

The suits were heard by the District Judge, Ahmedabad, who, by consent, dispo ed of all the contested points in one judgment He dismissed all the suits and ordered the parties to bear their own costs, holding that though the shroffs were liable in damages, they had paid enough

Both parties have appealed, and here, as in the Court below, one judgment will suffice The District Judge has dealt adequately and convincingly with the appellant shroffs' defence that they believed the expression "genuine Babashai" included Shikkai rupees, and that they did not disobey their instructions in accepting Shikkai rupees There can be no doubt in my mind, on the evidence that the shroffs deliberately accepted Shikkai rupees knowing that they ought not to do so and understanding why they *ought not* This defence is so disingenuous and without merit that I am surprised that we were troubled with it in appeal

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The defence that had Government returned the Shikkai rupees the shroffs could have minimised their obligation to make good the loss to Government is almost as disingenuous and quite as unconvincing The idea underlying this defence is that had the Mint returned the Shikkai rupees, the shroffs could have exchanged them for Babashai, have changed the latter for British and so have reduced their losses to something far short of what they have been required to pay to the Government How far the arithmetic of the defence is good I do not enquire At what rate the shroffs could have got rid of the Shikkai rupees had they been returned, is a matter of pure imagination and conjecture on which we need not occupy our minds It will suffice to say that the Government were not under any obligation, express or implied, to return, without any demands from the shroffs, the Shikkai rupees, which they had accepted, not even for the purpose of enabling these shroffs who had deliberately failed to fulfil their duties, to escape some part of the loss which such action entailed

We are only concerned to find out what was the loss to Government entailed by this neglect of duty on the part of their agents The plaintiff Government found themselves burdened with a large number of Shikkai rupees for which they had paid Rs 76 14 0 British per 100 though for coining purposes they were worth only Rs 62 7 6 Their loss clearly was the difference between these two sums for each 100 Shikkai rupees This is their loss because they can only do one of two things They can coin the Shikkai rupees into Indian currency, in which case they are worth to Government no more than the cost of buying an equivalent amount of silver in the open market and that is Rs 62 7 6 for each 100 Shikkai rupees Or they can sell the Shikkai rupees in the open market, in which event they will fetch only Rs 62 7 6 for each hundred The rate of Rs 62-7 6 is that which prevailed some time shortly after the acceptance of Babashai rupees at the treasuries and when consequently the duties of the shroffs had come to an end That rate varies, but no objection has been taken by either side to the rate of Rs 62 7-6 if it be determined that the rate to be taken is a rate subsequent to the last acceptance of Babashai

rupees at the treasuries The shroff appellants, however, contend that the rate which ought to be taken is the price of Shikkai rupees at the time the breach of duty by the shroffs occurred That rate would be Rs 67 or perhaps something more, and if that rate be taken, the loss payable by the shroffs is materially reduced That is the rate at which the District Judge has estimated the loss It seems to me he has proceeded on a wrong principle The actual loss to Government is what I have stated—that to my mind is clear beyond question The Government are entitled to be recouped that loss, (sections 73 and 211, Contract Act) unless it be shown that but for want of reasonable care or but for failure to perform some duty they owed the shroffs, they would have incurred a smaller loss There was no failure on the part of Government in the performance of their duties to the shroffs Was there any want of reasonable care? I cannot see that there was What is it that the Government failed to do which they ought to have done? The only thing suggested is that they should have returned the Shikkai rupees to the shroffs This point I have dealt with in so far as it is a matter of obligation Is their anything in it regarded as a matter of reasonable care? I think not I do not think it was unreasonable to retain the Shikkai rupees and I am unable to conceive of any reason for which it can be said to be unreasonable It is useless for me to deal further with the argument on this point addressed to us for I am unable to see anything in it whatever deserving of serious consideration

The arguments in these appeals have occupied us for a long time and have covered a variety of points as to which discussion is unnecessary The case is really very simple indeed The shroffs deliberately and knowing they were wrong to do so, accepted Shikkai rupees and thereby induced the Government to pay for them far more than they were worth, besides burdening Government with a commodity they had never undertaken to buy and did not want The loss caused to Government is unmistakeable and easy to ascertain Nevertheless the defendants have striven to minimise their liability, first by asserting entirely false defences, and then by the exercise of ingenuity in devising worthless legal arguments Had they been well advised they would not have appealed

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One other point remains In two of the cases the shroffs died *during the pendency of the suit or appeal, and it is urged* that the right to sue did not survive This contention is based on the maxim *"actio personalis moritur cum persona"* This maxim does not apply where, as here, the plaintiff has sustained a pecuniary loss arising out of a breach of obligation or contractual duty, by the person sued This seems to me to be clear from a study of the three English cases *Phillips* v *Homfray*[1] and *Batthyany* v *Walford*[2] and *United Collieries Ld* v *Simpson*[3] I would dismiss the appeals of the shroffs with costs throughout and allow the appeals of the Secretary of State and award the claims with costs throughout as proposed by my learned colleague

Decree accordingly

R R

(1) (1883) 24 C D 439 (2) (1887) 36 C D 269
(3) (1909) A C 8C C D 383 391

APPELLATE CIVIL

Before Mr Justice Chandavarkar and Mr Justice Heaton

1910 *July 1*

JOSE ANTONIO BARETTO (ORIGINAL DEFENDANT) APPELLANT v FRANCISCO ANTONIO RODRIQUES AND OTHERS (ORIGINAL PLAINTIFFS) RESPONDENTS *

Jurisdiction—Court—Consent of the parties as to jurisdiction—Suit of value beyond the jurisdiction of the Court—Trial of suit—Jurisdiction cannot be questioned in appeal—Evidence Act (I of 1872) section 58

The plaintiffs filed a suit for partition in the Court of the Subordinate Judge, First Class, valuing their claim at an amount which made the suit triable by that Court alone The Judge however made over the tri l of the suit to the Joint Subordinate Judge In the latter Court neither party raised any objection on the ground of jurisdiction nor was any issue raised relating to it The trial proceeded on merits and a decree was passed in favour of plaintiffs The defendant appealed to the lower appellate Court [illegible] for the first time raised the question of ju[illegible] on the strength [illegible] ket value stated in the plaint The obj[illegible] iled On a[illegible]

*Appeal

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Jose Antonio Baretto v. Francisco Antonio Rodriques

Held, that the market value stated in the plaint *prima facie* determined the jurisdiction

Held further, that as neither party raised any question as to want of jurisdiction in the first Court, and as they by their conduct and silence treated the market value to be of the amount sufficient to give jurisdiction to the Court, they dispensed with proof on the question by their tacit admissions and thus the principle of law laid down in section 58 of the Indian Evidence Act came into operation and prevented the result of the statement of the market value in the plaint.

As a rule, parties cannot by consent give jurisdiction where none exists This rule applies only where the law confers no jurisdiction It does not prevent parties from waiving inquiry by the Court as to facts necessary for the determination of the question as to jurisdiction, where that question depends on facts to be ascertained

Suit for partition

The plaintiffs filed a suit for partition of certain property, valuing their claim at Rs 7,000 It was filed in the Court of the Subordinate Judge, First Class, Thana, who had jurisdiction to try suits of any amount That Judge transferred the case for trial to the Court of the Joint Subordinate Judge at Thana, who was invested with jurisdiction to try suits involving claims valued at less than Rs 5,000 When the latter Judge took up the case for trial neither party raised any objection on the score of jurisdiction The suit was tried on its merits and decided in favour of plaintiffs

The defendant appealed to the District Judge where he contended among other things that the Subordinate Judge had no jurisdiction to try the suit The District Judge overruled the contention on the following grounds —

In the first place it was said that the moiety of the plaint property having been valued by the plaintiffs themselves at approximately Rs 7 000 the Court of the Second Class Subordinate Judge had no jurisdiction to try the suit Even assuming that this valuation is to be accepted, section 11 of the Suits Valuation Act, No 7 of 1887, furnishes a bar to the objection on the score of jurisdiction being entertained at this stage, because the objection was never taken at any stage in the Court of first instance Besides a glance at the record shows that the undervaluation, if any has not prejudicially affected the disposal of the suit on the merits. When such is the case the Court of Appeal would not interfere with the decree passed by the lower Court merely on the ground of an undervaluation In support of this view I rely upon the rulings in Indian

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Law Reports XXIV Calcutta, 661, XXXI Calcutta 334, XXIV Madras 43,427, XXV Allahabad 174 and VIII Calcutta Weekly Notes 70)

The defendant appealed to the High Court

Bhandarkar with *K A Padhye* and *G K Dandekar*, for the appellant —

The market value of the plaintiff's share, as stated in the plaint, was Rs 7,000 The only Court competent to try the suit was the Court of the Subordinate Judge, First Class (See section 24 of the Bombay Civil Courts Act) The fact that the defendant did not object to the jurisdiction of the Court, does not improve the case for, even a party's consent cannot confer jurisdiction where none exist See also *Ramayya* v *Subbarayudu*[1]

P B Shingne, for the respondent, was not called upon

CHANDAVARKAR J —The respondents as plaintiffs filed Suit No 48 of 1908 in the Court of the First Class Subordinate Judge, Thana, for a partition of the property in dispute In their plaint the market value stated was such as to make the suit triable only by the First Class Subordinate Judge That Judge made over the trial of the suit to the Joint Subordinate Judge at Thana He had no jurisdiction to try it if the market value stated in the plaint was correct Neither party raised any objection on the ground of jurisdiction, no issue was raised relating to it So the trial proceeded on the merits, and the Joint Subordinate Judge, after taking evid [illegible] the issues raised, passed a decree for partition in fa[illegible] the present respondents

The appellants on appeal to the District [illegible] d fc first time the question of jurisdiction, [illegible] h c market value stated in [illegible] T [illegible] objection on the ground [illegible] 11 [illegible] Va Act (7 of 1887) furn[illegible] to it [illegible] showed that "the und[illegible] (?) if [illegible] t cially affected the dis[illegible]

In this second appe[illegible] I support of it, *Ramayy*[illegible] (1)

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Jose Antonio Baptisto v. Francisco Antonio Rodrique

no doubt supports the contention But the principle governing the question of jurisdiction in such cases is laid down by our Court in several cases, of which the leading authority is *Lakshman Bhatkar* v *Babaji Bhatkar*[1] There it was said —"What *prima facie* determines the jurisdiction is the claim, or subject matter of the claim, as estimated by the plaintiff, and this determination having given the jurisdiction, the jurisdiction itself continues whatever the extent of the suit, unless a different principle comes into operation to prevent such a result or to make the proceedings from the first abortive"

In the present case, the market value stated in the plaint *prima facie* determined the jurisdiction It was not conclusive and binding on the plaintiffs so as to estop them from disputing its correctness or seeking its amendment merely because they had stated it in the plaint When the trial commenced before the Joint Subordinate Judge, it was open to the defendant to rely on the statement in the plaint and dispute the jurisdiction of the Court Had that been done, the plaintiffs might have asked for amendment and perhaps satisfied the Court by evidence that the market value had been overestimated in the plaint Neither party raised any question as to want of jurisdiction arising from the allegation in the plaint And by their conduct and silence, they treated the market value to be of the amount sufficient to give jurisdiction to the Court They dispensed with proof on the question by their tacit admissions, and thus the principle of law laid down in section 58 of the Indian Evidence Act came into operation and prevented the result of the statement of the market value in the plaint

But it is urged that parties cannot by consent give jurisdiction where none exists That is so where the law confers no jurisdiction Here the consent is not given to jurisdiction where none exists Here the consent related to the question of the market value No doubt the question of jurisdiction depended on that question But all that the law has said is that a suit relating to property, the market value of which is of, or exceeds a certain amount (Rs 5,000), shall not be tried by a

(1) (1883) 8 Bom 31 at p 33

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Law Reports XXIV Calcutta 661, XXXI Calcutta, 331, XXIV Madras 43, 427 XXV Allahabad 174 and VIII Calcutta Weekly Notes 70.

The defendant appealed to the High Court.

Bhandarkar with *K A Padhye* and *G K Dandekar*, for the appellant —

The market value of the plaintiff's share, as stated in the plaint, was Rs 7,000 The only Court competent to try the suit was the Court of the Subordinate Judge, First Class (See section 24 of the Bombay Civil Courts Act) The fact, that the defendant did not object to the jurisdiction of the Court, does not improve the case for, even a party's consent cannot confer jurisdiction where none exist See also *Ramayya v Subbarayudu*[1]

P B Shingne, for the respondent, was not called upon

CHANDAVARKAR J —The respondents as plaintiffs filed Suit No 48 of 1908 in the Court of the First Class Subordinate Judge, Thana, for a partition of the property in dispute In their plaint the market value stated was such as to make the suit triable only by the First Class Subordinate Judge That Judge made over the trial of the suit to the Joint Subordinate Judge at Thana He had no jurisdiction to try it if the market value stated in the plaint was correct Neither party raised any objection on the ground of jurisdiction, no issue was raised relating to it So the trial proceeded on the merits, and the Joint Subordinate Judge, after taking evidence on the issues raised passed a decree for partition in favour of the present respondents

The appellants on appeal to the District Court raised for the first time the question of jurisdiction, on the strength of the market value stated in the plaint That Court overruled the objection on the ground that section 11 of the Suits Valuation Act (7 of 1887) furnished a bar to it, and that the record showed that "the undervaluation, (?) if any, had not prejudicially affected the disposal of the suit on the merits"

In this second appeal the objection has been renewed, and, in support of it, *Ramayya v Subbarayudu*[1] is cited That decision

(1) (1889) 13 Mad. 25

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José Antonio Baletto v. Francisco Antonio Rodrique.

no doubt supports the contention But the principle governing the question of jurisdiction in such cases is laid down by our Court in several cases, of which the leading authority is *Lakshman Bhatkar* v *Babaji Bhatkar*[1] There it was said —"What *primâ facie* determines the jurisdiction is the claim, or subject matter of the claim, as estimated by the plaintiff, and this determination having given the jurisdiction, the jurisdiction itself continues whatever the extent of the suit, unless a different principle comes into operation to prevent such a result or to make the proceedings from the first abortive"

In the present case, the market value stated in the plaint *primâ facie* determined the jurisdiction It was not conclusive and binding on the plaintiffs so as to estop them from disputing its correctness or seeking its amendment merely because they had stated it in the plaint When the trial commenced before the Joint Subordinate Judge, it was open to the defendant to rely on the statement in the plaint and dispute the jurisdiction of the Court Had that been done, the plaintiffs might have asked for amendment and perhaps satisfied the Court by evidence that the market value had been overestimated in the plaint Neither party raised any question as to want of jurisdiction arising from the allegation in the plaint And by their conduct and silence, they treated the market value to be of the amount sufficient to give jurisdiction to the Court They dispensed with proof on the question by their tacit admissions, and thus the principle of law laid down in section 58 of the Indian Evidence Act came into operation and prevented the result of the statement of the market value in the plaint

But it is urged that parties cannot by consent give jurisdiction where none exists That is so where the law confers no jurisdiction Here the consent is not given to jurisdiction where none exists Here the consent related to the question of the market value No doubt the question of jurisdiction depended on that question But all that the law has said is that a suit relating to property, the market value of which is of, or exceeds a certain amount (Rs 5 000), shall not be tried by a

(1) (1883) 8 Bom 31 at p 33

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JOSE ANTONIO BARETTO v. FRANCISCO ANTONIO RODRIQUES

Second Class Subordinate Judge To bring that law into operation, the market value must be determined by evidence, where it is in issue If it is not in issue and is taken to be Rs 5,000 or more, there is no jurisdiction and parties by consent cannot give it But where it is not in issue and parties agree, expressly or by conduct, to treat the suit as one for property of lesser value than Rs 5 000, the maxim of law does not apply The law does not prevent parties from waiving inquiry by the Court as to facts necessary for the determination of the question as to jurisdiction, where that question depends on facts to be ascertained See *Biru Mahata v Shyama Churn Khawas*[1]

The only other point urged before us was on the question of mesne profits It had not been raised in either of the Courts below and involves no question of law not dependent on evidence We must therefore, decline to entertain it in second appeal

The decree is confirmed with costs

HEATON, J —The defendant by his own conduct led the Judge in the trying Court to suppose that he had jurisdiction to try this suit, or at least by his conduct prevented the Judge from suspecting that there could be any doubt as to whether he had jurisdiction The defendant's conduct also, I think, raises a presumption that for his part he did not accept the valuation of the property set out in the plaint, for, had he accepted that valuation, the question of jurisdiction should have been raised After the defendant's own conduct had led to this presumption, finding that the case was decided against him, he wishes in appeal to raise the question of jurisdiction That question can only be decided definitely by ascertaining on evidence what is the value of the property Having regard to the defendant's conduct the question is certainly a matter of doubt This is a second appeal, and I do not think we ought to allow the defendant to solve this difficulty by now remanding the case in order to enable him to adduce evidence on the point

Decree confirmed

P R

(1) (1895) 22 Cal 483 at p 486

APPELLATE CIVIL

Before Sir Basil Scott, Kt., Chief Justice, and Mr Justice Batchelor

RUSTOMJI ARDESHIR IRANI (ORIGINAL PLAINTIFF) APPELLANT *v* VINAYAK GANGADHAR BHAT AND OTHERS (ORIGINAL DEFENDANTS) RESPONDENTS * 　　1910 *July* 1o

Civil Procedure Code (Act V of 1908), Order XXI, rule 91—Contract Act (IX of 1872) section 18 clause (3)—Stamp Act (II of 1899), section 35—Court sale—Discovery that the judgment debtor had no saleable interest—Failure of consideration—Suit by auction-purchaser for possession or return of purchase money—Relations of the judgment creditor and auction purchaser—Suit not cognizable by Small Causes Court—Unstamped document regarded as non existent

A Court sale purchaser having discovered that the judgment debtors had no saleable interest in the property sold brought a suit against the judgment creditor for recovery of possession of the property or in the alternative return of the purchase money on the footing of total failure of consideration A question having arisen as to whether the suit was maintainable

Held the suit was maintainable inasmuch as under the Civil Procedure Code (Act V of 1908) there was an implied warranty of some saleable interest when the right title and interest of a judgment debtor was put up for sale and the purchaser s right based on such implied warranty to a return under certain conditions of the purchase money which had been received by the judgment creditor was recognized The relations of the parties namely the judgment creditor and the Court-sale purchaser were in the nature of contract

Held further that such a suit, though the subject matter was less than Rs 500 was not cognizable by a Court of Small Causes, there being a prayer for possession of immoveable property

An un tamped document being inadmissible in evidence must be taken as non existent

SECOND appeal from the decision of K Barlee, Acting District Judge of Poona, reversing the decree of T N Sanjana, Subordinate Judge of Haveli, at Poona

One Vinayak Gangadhar Bhat and his five co parceners obtained a money decree No 157 of 1898, in the Court of the First Class Subordinate Judge of Poona against Shapurji Hormasji and his son Pestonji In execution of the said decree the

* Second Appeal No 472 of 1909

1910

RUSTOMJI ARDESHIR IRANI v. VINAYAK GANGADHAR BHAT

judgment creditors presented a darkhast, No 629 of 1900, for the realization of their judgment debt by sale of the interest of the judgment-debtors under a trust-deed in certain properties At the Court-sale one of the properties was purchased by one Rustomji Ardeshir Irani for Rs 350, and on his attempting to take possession he was obstructed by the agent of Shapurji's sister Navajbai The auction-purchaser Rustomji Ardeshir Irani, thereupon applied for the removal of Navajbai's obstruction but the Court found that the judgment debtors Shapurji and Pestonji had no saleable interest in the property and rejected his application on the 19th March 1904 He, therefore brought the present suit against the judgment creditors Navajbai and her agent to recover possession of the property, or in the alternative for the refund of the purchase money, Rs 350 with interest

Defendants 1—6, that is, the judgment creditors Vinayak Gangadhar Bhat and his five co parceners contended *inter alia* that the suit as it was brought was not maintainable, that it was not true that the judgment-debtors had no saleable interest in the property, and that on the principle of *caveat emptor* it was the duty of the plaintiff to make inquiries before he purchased the property at the Court sale

Defendant 7, Navajbai, answered that the judgment debtors had no right, title and interest in the property at the date of the auction-sale, and that the plaintiff had not acquired any interest in the property by his purchase

The Subordinate Judge found that the suit was maintainable in the form in which it was brought that the judgment debtors had no saleable interest in the property and that the plaintiff was entitled to a refund of his purchase money He, therefore, passed a decree directing the plaintiff to recover from the judgment creditors, defendants 1—6, Rs 448 8 0 with interest at 9 per cent on Rs 350 from the date of the suit till payment of the amount and costs

In his judgment the Subordinate Judge observed as follows —

The chief dispute in the case is whether the judgment debtors had any saleable interest in the property or not In either case as the plaintiff has

brought his suit in the alternative, he is entitled to succeed If the judgment-debtors had saleable interest he ought to have possession of either the whole or part of the property If they have no saleable interest he ought to recover back his purchase money The plaintiff in his evidence said "I want my money back I do not want the bunglow I dont want the house even if the Court gives it to me There will be a good deal of expenditure I have no means. The learned pleader for the judgment creditors contended on the strength of this statement that it amounted to a withdrawal of the plaintiff's claim for possession and that consequently, there remained the claim for refund of the money which was cognizable by the Small Causes Court and that, consequently the Court had no jurisdiction The argument is I think, not correct His statement did not amount to a withdrawal of the claim What he meant to say was if an option was given to him he would like to have his money back rather than have the bunglow which would put him to a heavy expenditure Even if it amounted to a withdrawal, that does not oust the jurisdiction of this Court The jurisdiction of the Court depends on the suit as originally framed When once the Court became possessed of jurisdiction the subsequent withdrawal of a part of the claim does not oust its jurisdiction

On appeal by the judgment-creditors, defendants 1—6, the District Judge reversed the decree and dismissed the suit on the following ground —

Now the appellant (respondent?) has purchased Pestonji's interest that is, any interest he has through the second trust deed, what this may be is unknown He now wants to get out of his bargain, and the learned Subordinate Judge has found that he may do so as Pestonji had no saleable interest There can be no doubt that the burden of proof lies on respondent (auction purchaser) He has to prove that he was not able to get possession and that the interest was unsaleable (*vide* section 315 Civil Procedure Code, and 16 M. 316) If Pestonji has an interest however small respondent cannot have his money back (*vide* I L R 28 Cal 235) It has been settled by the Bombay High Court (22 Bom 783) that his cause of action does not arise until he has shown that the judgment debtors had no saleable interest The learned Subordinate Judge has found that he has discharged the burden by showing that the second trust deed has been impounded that is by showing that it was not a legal document, and that there is no legal valid document in existence I am unable to agree with this view This document is not shown to be invalid for want of registration but for want of stamp Once properly stamped will presumably be admissible Pestonji by paying the stamp duty may sue upon it and the respondent can do the same Briefly stated he has bought a right to sue and I do not think he is to be pitied if he has to pay legal expenses It is difficult to see how he can have expected to have for Rs 350 the right to a house which, he says, brings in Rs 150 a month rent It may turn out that the right he

has bought is non existent or not with the money he will have to spend. In the first case he can ask for a refund of his money, in the latter he will be no worse off than many other speculators.

The plaintiff, auction purchaser, preferred a second appeal

N M Patvardhan for the appellant (plaintiff, auction purchaser)

P D Bhide for the respondents (defendants, judgment creditors)

SCOTT, C J —The plaintiff sues as the purchaser at a Court sale of the interest of two judgment-debtors Shapurji and Pestonji in a certain land and bungalow under a trust deed of *Hormasji Sorabji dated the 23rd of December 1893* *His cause* of action as alleged in the plaint is the discovery that neither of the judgment debtors whose interest the Court purported to sell, had any saleable interest in the property The relief which he prayed for was, possession of the property described in the plaint, or in the alternative, return of the purchase money on the footing of a total failure of a consideration

His claim succeeded as regards the return of the purchase money in the first Court, but in the lower Appellate Court his suit was dismissed

A preliminary objection was taken that, as the amount decreed in respect of purchase money and interest in the first Court amounted to less than Rs 500, this was a matter which could not be the subject of a second appeal

This argument ignores the fact that the claim was not only for money, but also for possession and, therefore, the suit was not as framed cognizable by a Court of Small Causes

The failure of consideration upon which the plaintiff relies, arises as regards the judgment-debtor Shapurji from the fact that the whole of his interest had already been sold in execution of a previous decree against him, and also from the fact that a trust-deed under which it was alleged that he had an interest was not stamped

This latter objection also applied to the interest of the judgment debtor Pestonji

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The Subordinate Judge held, that in the absence of proof of the trust-deed upon which depended the existence of the alleged interest of the judgment debtors, it must be assumed that the judgment-debtors had no interest in the property, the subject of the sale

The lower Appellate Court however took the view that the document not being shown to be invalid for want of registration, but merely for want of stamp, it would presumably be admissible as soon as it was properly stamped, and that the purchaser by paying the stamp duty might sue upon it

We think, that, in coming to this conclusion the lower Appellate Court was in error Section 35 of the Stamp Act provides, that no instrument chargeable with duty shall be admitted in evidence for any purpose, unless such an instrument is duly stamped

As the document cannot be admitted in evidence, it must in this suit be taken to be non existent for, as was observed by Lord Halsbury in *Seaton* v *Burnand*(1) "Of things that do not appear and things that do not exist the reckoning in a Court of law is the same" We assume, therefore, as did the learned Subordinate Judge, that the plaintiff has made out his allegation that there is no trust deed before the Court under which the judgment debtor can be said to have any interest

It is then objected by the respondents that such a suit as the present will not lie, that there is no provision in the Civil Procedure Code enabling a purchaser to maintain such a suit, and that apart from the Civil Procedure Code, as shown by the decision in Privy Council in *Dorab Ally Khan* v *Abdool Azeez*(2), no suit will be maintainable

We think, however, that the right of the plaintiff to maintain a suit is made clear by the provisions of the Civil Procedure Code in the manner indicated in *Sundara Gopalan* v *Venkatavarada Ayyangar*(3) Under the Civil Procedure Code an implied warranty of some saleable interest when the right, title and

(1) (1900) A C 135 (2) (1878) L R 5 I A 116
(3) (1893) 17 Mad 228.

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interest of a judgment-debtor is put up for sale is implied, and the purchaser's right based thereon to a return under certain conditions of the purchase money which has been received by the judgment creditor is recognized The liability of the judgment-creditor under the circumstances to refund the purchase money which has been paid to him at a Court sale being thus established, there can be no objection to treating the relations of the parties, namely, the judgment creditor and the Court sale purchaser, as relations in the nature of contract This appears to have been done in the case of *Mahomed Kala Mea v Harperink*[1], where a suit brought by an auction purchaser at a Court sale against execution creditors and the judgment debtor, succeeded on the ground of misrepresentation on the part of the auctioneer, amounting to misrepresentation as defined by section 18, clause (3) of the Contract Act

In the present case upon the facts found we have a similar misrepresentation The purchaser has been caused, however, innocently to make a mistake as to the substance of the thing which was the subject of the sale He was led to believe that he was purchasing a right under a trust deed, whereas, so far as it appears from the facts proved, no trust deed was in existence There has, therefore been an entire failure of consideration The money, it is not disputed, has come into the hands of the judgment creditor and the first Court made a decree for its return with interest

An objection is taken in appeal that the suit is barred by limitation, but we have no facts before us to enable us to decide that point in favour of the respondents For, although the sale took place in the year 1900, it was not confirmed until the 3rd of November 1902, and although long prior to that date the purchase money had been paid into Court no order was made that it should be paid to the decree holders until the 3rd of February 1902 The respondents are unable to tell us when the decree holders received the purchase money We therefore cannot tell at what date they received the money to the use of the plaintiff, and we cannot say that the suit is barred by

(1) (1908) L R 36 I A 32

article 62 which appears to be the article which would be applicable to the case

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We therefore reverse the decree of the lower Appellate Court and restore that of the Subordinate Judge with costs throughout

Decree reversed

G B R

APPELLATE CIVIL

Before Mr Justice Chandavarkar and Mr Justice Heaton

WANA MARD RAVJI (ORIGINAL PLAINTIFF) APPELLANT v NATU WALAD MURHA AND ANOTHER (ORIGINAL DEFENDANTS) RESPONDENTS *

1910 *August* 1

Civil Procedure Code (Act V of 1908), O XXI r 1—Decree—Payment of money ordered in a decree—Payment ordered on a fixed date—Delay in making payment into Court owing to closing of Court—Payment on the opening day—General Clauses Act (X of 1897), section 10—Practice

A decree provided as follows 'The plaintiff should pay by the 10th day of April 1909 to the defendant Rs 100 If the moneys are not paid by the plaintiff as agreed upon the property in dispute will remain with the defendants by right of ownership and the plaintiff will have no right of owner ship over the same" The plaintiff chose to pay the money into Court and finding it closed on the 10th, she paid the money on the 14th April 1909 the day on which the Court re opened A question having arisen whether the payment so made was within the terms of the decree

Held that the payment was properly made, for O XXI, r 1 of the Civil Procedure Code 1908 intended to enact and did enact that payment into Court was a valid compliance with the decree even though the decree directed payment to the decree holder

SECOND appeal from the decision of H S Phadnis, District Judge of Khandesh, confirming the order passed by K G Tilak, Subordinate Judge of Yaval

Proceedings in execution

* Second Appeal No 88 of 1910

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WANA MARD RAVJI v. NATU WALAD MURHA

The decree under execution was passed on the 9th January 1909, it provided as follows —

"The property in dispute belongs to the plaintiff by right of ownership In the present matter, the plaintiff should, by the 10th day of April in the year 1909, pay to the defendants in all Rs 100, namely, one hundred for costs, &c If the moneys are not paid by the plaintiff, as agreed upon, the property in dispute will remain with the defendants by right of ownership, and the plaintiff will have no right of ownership over the same If on the plaintiff paying the moneys as agreed the defendants do not deliver over to her the possession, the plaintiff should recover possession of the property in dispute through a Court"

The payment directed by the decree was not made by the plaintiff to the defendants personally She chose to pay it into Court, and as the Court was closed on the 10th April 1909, she paid it on the 14th April, the day on which the Court re opened

The defendants contended that as the plaintiff had failed to make the payment on or before the 10th April 1909, the property had become his under the terms of the decree

Both lower Courts upheld the defendants' contention

The plaintiff appealed to the High Court

P P Khare, for the appellant —

The decree in question did not indicate any particular mode of payment, and O XXI, r 1 of the Civil Procedure Code, 1908, leaves it to the option of the party either to pay the money into Court or to the other party The delay in payment here was not owing to any default on plaintiff's part, and the payment made on the opening day of the Court enures to him See *Aravamudu Ayyangar* v *Samiyoppa Nadan*(1)

M V Bhat for the respondents —

The decree directed in specific terms that Rs 100 were to be paid on a fixed date There having been a default in payment, the terms of the decree must be enforced on that footing

HEATON, J —The decree with which we are here concerned stated as follows —' The property in dispute belongs to the

(1) (1898) 21 Mad 385

plaintiff by right of ownership In the present matter the plaintiff should, by the 10th day of April in the year 1909, pay to the defendants in all Rs 100, namely, one hundred for costs &c If the moneys are not paid by the plaintiff as agreed upon, the property in dispute will remain with the defendants by right of ownership and the plaintiff will have no right of ownership over the same"

The payment required was not made on or before the 10th April, but was made into Court on the 11th April On these facts both the lower Courts have held that the payment was not in time and was not of avail to satisfy the requirements of the decree The plaintiff, who has appealed, urges that she had the option of paying to the defendant or of paying into Court that she chose the latter method, and as the Court was closed from 10th to 13th April and she paid into Court on the 14th it is a good payment and a valid performance of what the decree requires

The reasoning of the Appellate Court was that the money had by the terms of the decree to be paid to the defendant that the plaintiff had no option to pay into Court In this the District Judge, in my opinion, was wrong Rule 1 of Order XXI of the Code of Civil Procedure provides that "all money payable under a decree shall be paid into Court," or "out of Court to the decree holder" It intends to enact and does enact that payment into Court is a valid compliance with a decree, even though the decree directs payment to the decree holder The ordinary form of money decree directs payment to the decree holder (See Forms 1 and 2 of Appendix D in the first Schedule to the Code) Payment into Court under such a decree is regarded, and in my opinion rightly regarded, as a compliance with the decree I say nothing as to what the law would be if the decree required that payment should be to the decree holder and not otherwise The decree is not in that form Therefore I think that had it been possible to pay into Court on the 10th April, such a payment would have discharged the obligation imposed on the plaintiff by the decree It was not possible for the Court was closed on that day Therefore, I think, section 10 of the General Clauses Act (Act X of 1897) comes into play and that the payment on the 14th April

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WANA MARD RAVJI v NATU WALAD MURHA

"the next day afterwards on which the Court was open" was just as good a payment as would have been a payment on 10th April had the Court been open on that day

Therefore I think the orders of the Courts below were wrong, that they must be reversed and the original Court directed to dispose of the application according to law Costs to be costs in the Darkhast

CHANDAVARKAR, J —I concur

Order reversed

R R

APPELLATE CIVIL

Before Mr Justice Chandavarkar and Mr Justice Heaton

1910 *August* 4

IRAWA KOM LAXMANA MUGALI AND OTHERS (ORIGINAL DEFENDANTS) APPELLANTS, *v* SATYAPPA BIN SHIDAPPA MUGALI AND ANOTHER (ORIGINAL PLAINTIFFS) RESPONDENTS *

Civil Procedure Code (Act V of 1908) section 11—Res judicata—Decision of first suit on merits but its dismissal for not paying the deficient Court fees—Second suit for trial on same merits

A previous suit between the parties failed on the ground that the claim was undervalued and the plaintiff when called upon to pay the deficient Court fees omitted to do so There were issues on merits also decided In a subsequent suit for trial on the same merits, the decision in the first suit was pleaded as *res judicata*

Held, that the rejection of the suit on the ground of undervaluation at any stage of it did not make it *res judicata* for the purposes of a subsequent suit on the same cause of action or litigating the same title

Held, further that the dismissal of the suit on the ground of undervaluation having been sufficient by itself the findings on the issues on the merits were not necessary for the decision of the suit and could not have the force of *res judicata*.

APPEAL from order passed by V V Phadke, First Class Subordinate Judge of Belgaum reversing the decree passed by, and remanding the suit to, C G Kharkar, Subordinate Judge at Gokak

* Appeal No 13 of 1910 from order.

Suit for possession of property.

The property in dispute belonged to one Laxmana, who died leaving him surviving his widow Irawa (defendant No 1), a sister Shidawa (plaintiff No 2) and a distant relative Satyappa (plaintiff No 1)

Irawa, after her husband's death, sold a portion of his property to her father Satyappa (defendant No 2), and subsequently adopted her brother Shidappa (defendant No 3)

Satyappa alone first brought a suit in 1904 against the defendants to recover possession of the property, alleging an oral will made in his favour by Laxmana The Court found on the merits that the plaintiff was not the next reversionary heir of Laxmana and could not sue It also found that the plaint was engrossed on a deficient stamp-paper The plaintiff was asked to satisfy the deficiency, and failed to do so, whereupon the suit was rejected.

In 1908, Satyappa and Shidawa brought another suit against the same defendants for the same relief

The defendants contended *inter alia* that the suit was barred by *res judicata*

The Subordinate Judge upheld the contention on the following grounds —

Thus the matter "directly and substantially" in issue in this suit had also been "directly and substantially" in issue in the suit in Chikodi Subordinate Judge's Court It is not necessary to constitute a matter 'directly and substantially in issue' that a distinct issue should have been raised upon it It is sufficient if the matter was in issue in substance (12 B L R 304) It also appears from the judgment of Chikodi Subordinate Judge's Court (exhibit 30) that the matter in issue has been heard and finally decided It is unnecessary that the whole matter in issue should have been finally heard and decided The principle of *res judicata* applies both to the trial of suits and to the trial of issues (I L R 7 All 615 and I L R 28 All 727) The learned pleader for the plaintiff admits that the finding of Chikodi Subordinate Judge on issue No 3 in his judgment is a finding on the merits but contends that the finding has not been properly arrived at after going fully into evidence and arguments and that the Subordinate Judge went into the matter superficially as he wanted to dismiss the suit for want of proper Court

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fee that he should have rejected the suit under O VII, r 11 of Civil Procedure Code and therefore the finding on the 3rd issue was improper and in fact an *obiter dictum* and in this respect relies on the ruling in *Ahmedbhoy Habibhoy* v *Sir Dinshaw M Petit, Bart*, 11 Bom L R 366 I do not think the ruling applies here The finding of the Subordinate Judge of Chikodi on the 3rd issue cannot be called an *obiter dictum* but would be binding as *res judicata* notwithstanding the fact that the suit was disposed of also on other grounds (I L R 1 All 480 and I L R 2 All 849) Moreover the principle of *res judicata* does not depend for its application upon the question whether the decision which is used as a bar was a right decision or a wrong decision and it is immaterial whether the decree set up as a bar was rightly or wrongly passed (I L R 24 All 138 and 23 All 405)

This decree was reversed on appeal by the lower appellate Court, who remanded the suit for trial on its merits

The defendants appealed to the High Court

C A Rele, for the appellants

S R Bakhale, for the respondents

CHANDAVARKAR, J — There was no doubt a decision on the merits in the previous suit, which is relied upon by the appellant as barring the present suit as *res judicata*, and the title of reversionary heir, which was claimed there as it is claimed here by the 1st respondent, was negatived by the finding of the Subordinate Judge, who tried that previous suit But the Subordinate Judge also gave another reason for dismissing that suit of the respondent The reason was, that the plaint had been undervalued and that the plaintiff (the 1st respondent in this second appeal) had refused to pay the additional Court fee If this last reason was sufficient by itself for the dismissal of the previous suit, the findings on the issues on the merits were not necessary for the decision of the suit and cannot have the force of *res judicata* *Ghela Ichharam* v *Sankalchand Jetha*[1]

The question, then, is whether the ground of undervaluation was sufficient by itself for the dismissal of the previous suit Section 54 of the Code of Civil Procedure (Act XIV of 1882) which was in force then, required that the "plaint shall be

(1) (1893) 18 Bom 597

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IRAWA KOM LAXMANA MUGALI v. SATYAPPA BIN SHIDAPPA MUGALI

rejected," if undervalued Instead of rejecting the plaint before registration, the Subordinate Judge dismissed the suit after its registration and after trial But after the suit had been registered, the Subordinate Judge had power to reject it at any subsequent stage on the ground of improper valuation And, as was held by this Court in *Dullabh Jogi* v *Narayan Lakhu*[1] whether a suit is rejected on that ground before registration or at any subsequent stage, the effect is the same "as if the plaint had been originally rejected" It was also held in that case that the rejection of a suit on the ground of undervaluation at any stage of it does not make it *res judicata* for the purposes of a subsequent suit on the same cause of action or litigating the same title because, as was said there by Couch, C J, "the former suit was not heard and determined, for it failed by reason only of an informality, and it would be contrary to all principles of justice that the parties should be held to be conclusively barred thereby"

For these reasons the order of remand appealed from must be confirmed with costs

HEATON, J —I concur in the order and reasons for it but express no opinion on the question whether if the decision in the earlier suit were to be regarded as a decision on the merits it would operate as a bar under section 11 of the Code of Civil Procedure

Order confirmed

R R

(1) (1867) 4 B H C A C J 110

APPELLATE CIVIL

Before Mr Justice Chandavarkar and Mr Justice Heaton

1910 August 4

CHHAGANLAL KISHOREDAS (ORIGINAL PLAINTIFF) APPELLANT *v* THE COLLECTOR OF KAIRA (ORIGINAL DEFENDANT), RESPONDENT *

Civil Procedure Code (Act XIV of 1882) section 424—Suit against Government—Notice—Bhagdari and Narvadari Act (Bombay Act V of 1862), section 3 †—Mortgage of a narva—Collector declaring the mortgage invalid—Suit against Collector without notice

The plaintiff filed a suit against the Collector of Kaira to obtain a declaration that an order passed by that officer under section 3 of the Bhágdari and Narvádári Act (Bombay Act V of 1862) declaring some mortgages in plaintiff's favour null and void was inoperative No notice was given to the defendant as provided for by section 424 of the Civil Procedure Code of 1882 —

Held that the notice required by section 424 of the Civil Procedure Code of 1882 was necessary to be given for the declaration was a distinct act of the Collector done in the exercise of a statutory power and therefore in his official capacity

* Second Appeal No 966 of 1909

† The section runs as follows —

3 It shall not be lawful to alienate a sign mortgage o otherwise charge or incumber any portion of any bhág or share in bhágdári or narvádári village other than a recognized sub division of such bhág or share or to alienate assign mortgage or otherwise charge or incumber any homestead building site (gabhán) or premises appurtenant or appendant to any such bhág or share or recognized sub-division appurtenant or appendant thereto apart or separately from any such bhág or share or recognized sub-division thereof

Any alienation assignment mortgage charge or incumbrance contrary to the provisions of this section shall be null and void and it shall be lawful for the Collector or other chief revenue officer of the district whenever he shall upon due inquiry find that any person or persons is or are in possession of any portion of any bhág or share of any homestead building site (gabhán) or premises appurtenant or appendant to such bhág or share in any bhágdári or narvádári village other than a recognized sub division of such bhág or share in violation of any of the provisions of this section summarily to remove him or them from such possession, and to restore the possession to the person or persons whom the Collector shall deem to be entitled thereto;

And any suit brought to try the validity of any order or orders which the Collector may make in such matter must be brought within three months after the execution of such order or orders

Per Curiam.—"The true test of an action for the purposes of section 424 is whether the wrong complained of as having been done by the public officer sued amounts first, to a distinct act on his part, and secondly whether that act purported to have been done by him in his official capacity Both these elements must combine to render necessary the giving of notice under section 424 as a condition precedent to suit"

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CHHAGANLAL KISHOREDAS v. THE COLLECTOR OF KAIRA

APPEAL from the decision of C V Vernon, District Judge of Ahmedabad, confirming the decree passed by K Bailee, Assistant Judge of Ahmedabad

Suit for declaration

The plaintiff held two mortgages on certain lands belonging to one Lakshmidas These mortgages were subsequently declared null and void by the Collector of Kaira under section 3 of the Bhagdari and Narvadári Act (Bombay Act V of 1862) The heirs of Lakshmidas entered into possession of the lands on the strength of that order

The plaintiff filed a suit against the Collector of Kaira for a declaration that the order passed by him under section 3 of the Bhágdari Act was null and void The notice required by section 424 of the Civil Procedure Code of 1882 was not given

The preliminary issue raised in the Court of first instance was, whether the suit was bad owing to the want of notice under section 424 of the Civil Porcedure Code of 1882 The Court held that want of notice was a fatal defect in the case On appeal this decree was confirmed by the District Judge

The plaintiff appealed to the High Court

T R Desai, for the appellant —

We submit first that notice required by section 424 is only confined to actions in tort *Shahebzadee Shahunshah Begum* v *Fergusson*[1] The section does not apply where the suit is one *ex contractu* (*Rajmal* v *Hanmant*[2]) See also *Bhau Balapa* v *Nana*[3], *Flower* v *Local Board of Low Leyton*[4] We further contend that in any view, notice is not required in cases under the Bhágdari and Narvadári Act The Act is a complete

(1) (1881) 7 Cal 499
(2) (1895) 20 Bom 697
(3) (1888) 13 Bom 343
(4) (1877) 5 Ch. D 347

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enactment by itself It provides for suit against the Collector—not the Secretary of State, and has a special period of three months within which the suit must be instituted If section 424 of the Civil Procedure Code of 1882 is read along with it, then the period provided by the Bhágdári Act is likely to be curtailed

G S Rao, Government Pleader, for the respondent —

We say that the notice under section 424 is necessary, where the Act complained of is done by a public officer in discharge of his duty as such officer The reasoning in *Shahebzadee Shahunshah Begum* v *Fergusson*[1] is not accepted in *The Secretary of State for India in Council* v *Rajlucki Debi*[2] The Bhagdari Act is not an enactment complete by itself It does not dispense with the notice under section 424 of the Civil Procedure Code of 1882, and the latter Code makes no reservation in favour of the Bhágdári Act

CHANDAVARKAR, J —There are no doubt *dicta* in some of the decisions of this Court, which, detached from the context, would seem to lend support to the view that section 424 of the old Code of Civil Procedure (Act XIV of 1882) reproduced as section 80 of the new Code, applies only to actions in tort But carefully examined those decisions lay down that actions *ex contractu* are excluded from the operation of the section The true test of an action for the purposes of section 424 is whether the wrong complained of as having been done by the public officer sued amounts first, to a distinct act on his part, and, secondly, whether that act purported to have been done by him in his official capacity (*Bhau Balapa* v *Nana*[3]) Both these elements must combine to render necessary the giving of notice under section 424 as a condition precedent to suit

In the present case they both exist What is complained of is that in the exercise of the power conferred upon him by the provisions of section 3 of the Bhágdári Act (Bombay Act V of 1862), the Collector has declared the plaintiff's mortgages illegal

(1) (1881) 7 Cal. 499 (2) (1897) 25 Cal. 239 at p 243
(3) (1888) 13 Bom 343

and inoperative, and that thereby he has enabled one of the mortgagor's heirs to take possession of the land mortgaged with possession to the plaintiff, and the Court is asked to set aside the Collector's order, containing the declaration, as null and void The declaration is a distinct act of the Collector, done in the exercise of a statutory power and therefore in his official capacity

But it is urged that section 424 must be held not to apply to such a suit, brought under the Bhagdari Act, because, it is said, the Act is a complete piece of legislation by itself for its own purposes and is unaffected by the provisions of section 424 of the Code This argument is based upon the fact that, according to section 3 of the Act a suit to set aside the Collector's order as invalid must be brought within three months from the date of its execution whereas, according to section 424, no suit against a public officer can be brought "until the expiration of two months next after notice in writing has been delivered to or left at the office of" the officer It is contended that the application of section 424 to a suit under section 3 of the Bhágdári Act has the inevitable result of cutting down the three months' period of limitation prescribed in the section to one month, and that the Legislature must not be presumed to have contemplated such a result and the taking away partly by means of the Code what it had given by means of the Act

But the same may be urged in the case of every suit against a public officer in respect of an act done in his official capacity In the case of every wrong done by him in his official capacity, which gives a cause of action and right to sue, the Limitation Act provides a period within which he must be sued, and that period is necessarily shortened by the period of two months in section 424 of the Code of Civil Procedure It does not therefore follow, and it can hardly be contended, that section 424 does not apply To hold that would be to render the provisions of that section practically nugatory

We must presume that in enacting section 424, the Legislature was aware of the provisions of section 3 of the Bhagdári Act, and that, had it intended to exclude that section from the

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operation of section 424, it would have used apt language to convey its meaning The construction contended for by the appellant's pleader seeks to add words to section 424, which are not in it That is not construction but legislation

No doubt if the two sections were mutually repugnant, that construction would be sound and sensible But they are easily reconcilable Section 3 of the Bhágdari Act points to the period *within* which the suit must be presented, section 424 of the Code limits the period *after* which the action must be filed And the latter does not totally render the former abortive but leaves some period for the filing of the suit within the three months prescribed by the Act That may cause some inconvenience and hardship, but "arguments *ab-inconvenienti* must be used with great reserve when they are opposed to the grammar of a statute, but are of great weight in determining between two constructions each consistent with the grammar" *Wentworth* v *Humphrey*[1] Laws are framed with an eye to cases which frequently occur and "it is no reason, when the words of a law do enough extend to an inconvenience seldom happening that they should not extend to it as well as if it happened more frequently, because it happens but seldom" *Fenton* v *Hampton*[2] If there is any hardship, and even if it could be proved that a mistake has been made by the Legislature in enacting the provisions of section 424, in forgetfulness of section 32 of the Bhágdari Act, "it would not be competent for a Court of law to disregard its enactments If a mistake has been made, the Legislature alone can correct it" *Labrador Company* v *The Queen*[3]

For these reasons we are of opinion that the lower Courts have rightly held that section 424 of Act XIV of 1882 applied to this suit, and that, as its provisions were not complied with by the plaintiff, the suit must be dismissed The decree must, therefore, be confirmed with costs

Decree confirmed

R R

(1) (1886) 11 App Cas. 619 at p 626 (2) (1858) 11 M P C 347 365
(3) (1893) A C 104 at p 123

ORIGINAL CIVIL

Before Mr Justice Macleod

IN THE MATTER OF MEGHRAJ GANGABUX, AN INSOLVENT * 1910 March 17

Presidency Towns Insolvency Act (III of 1909), section 25—Protection order—Previous decisions on applications for interim orders—Discretion—Practice

It has never been the practice of Commissioners in Insolvency under the Indian Insolvent Act (11 and 12 Vict c 21) to consider themselves bound by their previous decisions on applications for *interim* orders when it has been a matter for their discretion and it by no means follows that because an application has been refused on the first occasion it must also be refused on the second occasion

Section 25 of the Presidency Towns Insolvency Act (III of 1909) clearly intends that while an insolvent diligently performs the duties prescribed by the Act he should not be harassed by execution creditors and should not be rendered liable to pressure whereby one creditor may get undue advantage over another The section does not deprive the Court of its discretion in granting or refusing protection but sub section (4) indicates clearly the lines along which that discretion should be exercised when a creditor opposes the grant. If an insolvent can produce the certificate referred to the onus is thrown on the opposing creditor of showing cause why the protection orders should not be granted

THIS was an application by the insolvent for an *interim* protection order

The facts appear sufficiently from the judgment

Mankar for the insolvent

Weldon for an opposing creditor

Bahadurji for another opposing creditor

MACLEOD, J —The insolvent has applied for a protection order under section 25 of the Presidency Towns Insolvency Act This application is opposed by two of his creditors On the 16th January a similar application was refused by Davar, J, and an appeal against that decision was dismissed It has been urged before me that the situation is exactly the same as it was on the 16th January, and since the application was refused then

* In Insolvency No 2 of 1910

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I am bound to refuse it now It has never been the practice for Commissioners in Insolvency under the Indian Insolvent Act to consider themselves bound by their previous decisions on applications for *interim* orders when it has been a matter for their discretion, and it by no means follows that because an application has been refused on the first occasion it must also be refused on the second occasion

The application of the 16th January was made when the new Act had only just come into force, and I do not think the change effected generally by the Act in insolvency proceedings and particularly by section 25 in respect of protection orders was even mentioned during the argument

The Act gives to the Court and its officers the fullest powers to investigate into the conduct and affairs of an insolvent, the Official Assignee conducts his public examination and reports on his conduct when he applies for his discharge, while the burden which has hitherto rested upon creditors of protecting commercial morality has been entirely removed from their shoulders Section 25 clearly intends that while an insolvent diligently performs the duties prescribed by the Act he should not be harassed by execution creditors, and should not be rendered liable to pressure whereby one creditor may get undue advantage over another The section does not deprive the Court of its discretion in granting or refusing protection, but sub section (4) indicates clearly the lines along which that discretion should be exercised when a creditor opposes the grant If an insolvent can produce the certificate referred to, the onus is thrown on the opposing creditor of showing cause why the protection order should not be granted, but I do not think he is entitled to ask the Court to enter into an inquiry whether the insolvent has been guilty or not of commercial immorality, or of an offence under the Act It is open to the creditor to show that the insolvent has imposed on the Official Assignee, and that in spite of the certificate he has not conformed to the provisions of the Act, or that the insolvent has been guilty of undue delay in applying for his discharge, for, the Court will not countenance an insolvent resting unreasonably beneath the shade of the protection order

The Court must act in the interests of all the creditors and not in the interest of any particular creditor who wishes by way of compensation for his loss to put the insolvent in jail This may often result in an insolvent's relations paying money to the execution creditor to get the insolvent released It is for the interests of the creditors that the affairs of an insolvent should be fully investigated under the Act, and that cannot possibly be done if he is put in jail, or has to go into hiding to escape from arrest Section 25 provides the Court with means whereby the Court can secure compliance with the provisions of the Act, and an opposing creditor should show that the Court has a grievance when asking the Court to exercise its discretion against an insolvent

In my opinion the opposing creditors have not realised the change effected by the new Act, and I see no reason why the insolvent should not be granted protection On the contrary it must be in the interests of all the creditors that he should be given a chance of winding up his estate

Attorneys for the insolvent Messrs *Ardeshir Hormusjee, Dinshaw & Co*

Attorneys for opposing creditors Messr *Crawford, Brown & Co*, and *Edgelow, Gulabchand and Wadia*

K McI K

APPELLATE CIVIL

Before Sir Basil Scott, Kt Chief Justice, and Mr Justice Batchelor

MOJILAL PREMANAND AND OTHERS (ORIGINAL PLAINTIFFS) APPELLANTS, v GAVRISHANKAR KUSHALJI AND OTHERS (ORIGINAL DEFENDANTS 1, 4 AND 3) RESPONDENTS * 1910 July 13

Limitation Act (XV of 1877) section 10—Will—Trustees—Suit by testator's sister for declaration of heirship and ownership of the residue of testator's estate—Resulting trust arising by operation of law—Limitation

One Jethabhai died on the 7th December 1889 after having made a will dated the 20th February 1889 The will gave certain legacies including one

* Second Appeal No 402 of 1909

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of Rs 300 to the plaintiff, testator s sister Under the will five trus ees were appo nted and it provided as follows — Out of these five (trust es) Dave Gavrishankar Kushalji and my nephew (plaintiff s son) D sai Mojilal Prem anand should both join and take possession of my properties after my death in accordance with the above will, and with the consent of the remaining trustees they are to dispose of the properties in accordance with what is written in the above will and should any outstandings have to be recovered for giving effect to the said dispositions they are to do the same and I do by this will give them power to do whatever else they may have to do to carry out the will

In the year 1906 the plaintiff having brought a suit for the declaration that she was the heir of the testator, her brother and as such owner of the residue remaining after administering his property under the will and for the recovery of the residue, a question arose as to whether the suit was time barred on the ground that there was *no trust declared with regard to the residue* and no direc tion given to distribute it among heirs at law

Held, that the suit was not time barred and that once the testator s property was vested in the trustees for a specific purpose t was not necessary that any resulting trust of the res due which necessarily arose by operation of law, should be specified in words in the will in order to bring it within the scope of section 10 of the Limitation Act (XV of 1877)

SECOND appeal from the decision of T N Sanjana, First Class Subordinate Judge of Ahmedabad with Appellate Powers, reversing the decree of Keshavlal V Desai, Acting Subordinate Judge of Nadiad

One Jethabhai Walavram died on the 7th December 1889 after having made a will dated the 20th February 1889 Under the will the testator gave certain legacies, including one of Rs 300, to his sister Saraswatibai The material portion of the will was as follows —

With the property that might remain after paying as above the expenses of my obsequies are to be defrayed I do make disposition in this way in my consciousness and in order to carry out the e dispositions I appoint after me the following gentlemen as tru tees —Dave Gavrishankar Kushalji, Desai Mojilal Premanand Dave Parbhashankar Purshottam, Desai De ubhai Kalidas and Desai Maneklal Amratlal Out of these five Dave Gavrishankar Kushalji and my nephew De ai Mojilal Premanand should both join and take possession of my properties after my death in accordance with the above will and wi h the consent of the remaining trustees they are to dispose of the properties in accordance with what is written in the above will and should any outstandings have to be recovered for giving effect to the said dispositions, they are to do the same and I do by this will give them power to do whatever else they may have to do to carry out the will

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In the year 1906 the testator's abovementioned sister Saraswatibai brought the present suit (1) for a declaration that she was the heir of the testator and as such the owner of the residue remaining after administering his property under his will, (2) for an account determining the amount of the said remaining property and of the outstandings realized by the defendant trustees and determining with which of the defendants the same or any part thereof was, (3) for an injunction restraining the defendants from obstructing her in taking possession of the property and outstandings so found remaining and restraining them from recovering the same, (4) for an order directing the defendants to hand over to her all the account books, bonds and other vouchers pertaining to the estate of the testator and (5) for an order directing defendants 1 and 4 to give to her a registered san mortgage bond for Rs 1 300 and to pay to her the outstandings belonging to the testator which they and defendant 4's father and grandfather had realized as trustees under the will

The plaintiff Saraswatibai having died after the institution of the suit, her son Mojilal Premanand, who was one of the trustees under the will and who was joined in the suit as defendant, applied with his brothers to have their names entered on the record in the place of the deceased and the Court ordered it to be done So Mojilal, original defendant 2, became one of the plaintiffs in the suit

Defendant 1, Gavrishankar Kushalji, answered *inter alia* that the suit was time barred, that the testator had by his will disposed of his residue, that the plaintiff was not entitled to the residue, that what was directed by the will to be given to the plaintiff was given to her and that he had with him Rs 105 11 5 as the balance of the trust property

Defendants 2 and 3, Desaibhai Kalidas and Harilal Desaibhai, admitted the plaintiff's claim and stated that the residue of the testator s property and the bonds and documents were with defendants 1 and 4

Defendant 4, Ganpat Chunilal, raised the same contention as defendant 1 and added that he was not a trustee under the will, that he simply did what the other trustees asked him to do and that he had Rs 107-11 3 and documents in his possession

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The Subordinate Judge found that the plaintiff Saraswatibai was the nearest heir of the testator and was entitled to recover the residue of the testator's property after giving bonds of the nominal value of Rs 100 to *Vyatipat* institution in Mahudha, that defendant 4 was in management of the estate as trustee, that the plaintiff was entitled to recover from defendant 1 Rs 81-7-0 and from defendant 4 Rs 107-11 3, that the plaintiff was entitled to recover from defendants 1 and 4 documents and other papers relating to the estate of the testator and the suit was in time The Subordinate Judge, therefore, decreed the plaintiff's claim

On appeal by defendants 1 and 4, the appellate Court reversed the decree and dismissed the suit on the ground that it was time-barred

The plaintiffs preferred a second appeal

M P Modi with *N K Mehta* for the appellants (plaintiff)

Rangnekar with *T R Desai* and *Raghavaya and Bhimji* for respondents 1 and 2 (defendants 1 and 4)

L A Shah for respondent 3 (defendant 2)

SCOTT, C J —This is a suit instituted by Saraswatibai, widow of Premanand Parbhudas and sister of Jethabhai Walavram, for a declaration that she is the heir of her brother Jethabhai and as such owner of the residue remaining after administering his property under his will

Jethabhai Walavram by his will, dated 20th of February 1889, gave certain legacies including one of Rs 300 to the plaintiff and by the last clause provided as follows —" With the property that might remain after paying as above the expenses of my obsequies are to be defrayed I do make disposition in this way in my consciousness and in order to carry out these dispositions, I appoint after me the following gentlemen as trustees Dave Gavrishankar Kushalji, Desai Mojilal Premanand, Dave Parbhashankar Purshottam, Desai Desaibhai Kalidas and Desai Mancklal Amratlal Out of these five, Dave Gavrishankar Kushalji and my nephew Desai Mojilal Premanand should both join and take possession of my properties after my death in accordance with the above will and with the consent of the remaining trustees,

they are to dispose of the properties in accordance with what is written in the above will and should any outstandings have to be recovered for giving effect to the said dispositions, they are to do the same and I do by this will give them power to do whatever else they may have to do to carry out the will"

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The trustees named in the will have performed the funeral obsequies which are necessary in the case of a Hindu in the position of the testator, and they have also paid the legacies mentioned in the will Three of the trustees are now dead The property of the testator has not been exhausted in carrying out the trusts of the will It now consists of money advanced upon a san mortgage deed for Rs 1,300, the mortgagees being Gavrishankar Kushalji, Mojilal Premanand, Desaibhai Kalidas and Maneklal Amratlal and a small sum of cash in the hands of the second respondent

The suit was brought against Gavrishankar Kushalji Mojilal Premanand, original trustees Ganpatlal Chunilal as representative of Maneklal Amratlal, and Harilal Desaibhai as representative of Desaibhai Kalidas

A decree was obtained by the plaintiff in the Court of the Subordinate Judge but that decree was reversed upon the appeal to the Joint First Class Subordinate Judge with Appellate Powers on the ground that the suit was barred by limitation

In second appeal the point which has been argued is whether the suit is barred by limitation having regard to the fact that the property is in the hands of the trustees named in the will and the representatives of named trustees who are dead

It is argued that the property is vested in the defendants in trust for a specific purpose and that this is a suit of the nature contemplated in section 10 of the Limitation Act of 1877

It has been held by a Full Bench of this Court in *Lallubhai Bapubhai* v *Mankuvarbai*[1] that a suit against an executor by an heir of a testator who has by will made the executor an express trustee for certain purposes is, as to the

[1] (1876) 2 Bom 388 at 411

undisposed of residue, a suit within the scope of section 2 of Act XIV of 1859 That section provided that no suit against a trustee in his life time and no suit against his representatives for the purpose of following in their hands the specific property which is the subject of the trust, shall be barred by any length of time

The section of the Act of 1877 with which we are concerned provides that no suit against a person in whom property has become vested in trust for any specific purpose or against his legal representatives or assigns not being assigns for valuable consideration for the purpose of following in his or their hands such property shall be barred by any length of time

Is the property which is the subject of this suit, property which has become vested in the trustees in trust for any specific purpose? It is, we think, clear that it has been vested in them for the purpose of *application in carrying* out the trusts of the will Once the testator s property is vested in them for a specific purpose it is not necessary that any resulting trust of the residue which necessarily arises by operation of law should be specified in words in the will in order to bring it within the scope of section 10 That was the opinion of the Court in *Vundravandas* v *Cursondas*[1] The learned Judges in that case said, "It must, we think, be conceded that where a Hindu will makes the executors trustees of the whole estate of the testator, and the bequests in the will are not sufficient to exhaust that estate, the executors become express trustees of the undisposed of residue for the next of kin of the testator That has been so decided by this Court in *Lallubhai* v *Mankuvarbai*[2], where the case of *Salter* v *Cavanagh*[3] was followed, as it was also followed by the Queen's Bench Division in England in *Patrick* v *Simpson*[4]," and after further discussion of the point they add "We have considered this question as though the expression 'express trust' had been used in our Statute (Act XV of 1877, section 10), but for this purpose we think that 'vested in trust for a specific purpose' may be treated as a more

(1) (1897) 21 Bom 646 at 654
(2) (1876) 2 Bom 388 at 414
(3) (1833) 1 Drury and Walsh 668
(4) (1889) 24 Q B D 131

expanded mode of expressing the same idea Our decision on this point is supported by the case of *Kherodemoney* v *Doorga money*[1] which cannot, we think, be substantially distinguished from it" 1910

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We therefore, hold that the suit was not barred by limitation

There is no dispute as to the property to which the plaintiffs, as representing the original plaintiff Saraswatibai, are entitled

We reverse the decree of the lower appellate Court and declare that the appellants are entitled to recover the an mortgage bond Exhibit 84, and all the mortgage bonds and personal bonds and documents relating to the undisposed of and unexhausted residue of Jethabhai's estate Order that respondent 2 do retain one bond of the nominal value of Rs 100 for delivering to the *Vyatipat* institution Order that the respondents 1 and 2, if and when required so to do by the appellants, do assign to them the said bonds and documents at the appellants expense Decree that respondent 1 do pay Rs 81 7 0, that respondent 2 do pay Rs 107 11 3 and that respondents 1 and 2 do pay Rs 60 to the appellants Decree that first and second respondents do pay the costs throughout of appellants and third respondent

Decree reversed

G B R

CRIMINAL APPELLATE

Before Mr Justice Chandavarkar and Mr Justice Heaton

EMPEROR v SHANKAR SHRIKRISHNA DEV * 1910 July 1

Press Act (XXV of 1867) sections 4 5—Declaration made by owner who took no part in managing a printing press—Publication of a seditious book at the press—Penal Code (Act XLV of 1860), section 124A—Sedition—Intention

The accused made a declaration under Act XXV of 1867 section 4, that he was the owner of a press called 'The Atmaram Press' Beyond this, he took

* Criminal Appeal No 1 7 of 1910

(1) (18 8) 4 Cal 455

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no part in the managem nt of the press which was carried on by another p rson A book styled "Ek Shloki Gita" was p rinted at this press It was a b ok that dealt to a large ex nt with metaphysics philosophy and religion It al o contained s ditious pas a es scatt red among discussions of religious matters It was not shown that the accused ev r read the book or was aware of the s ditious passages it contained The accused was convicted of the offence punishabl under sect on 124A of the Indian Penal Code, 1860 as publisher of the book On appeal

Held by *Chandavarkar, J* that the cumulative effect of the surrounding circumstances was such as to mak it improbable that the accused had read the book or that he had known its seditious object and that the evidence having thus been evenly balanced and equivocal a reasonable doubt arose as to the guilt of the accused the benefit of which should be given to him

Held, by *Heaton J* that before the accused could be convicted under section 124A of the Indian Penal Code t must be found that he had an intention of exciting disaffection and that the evidence fell very short of proving the inten ion

Per CHANDAVARKAR J —A declaration made under section 4 of the Press Ac is intended by the legislature to have a certain effect, namely that of fa tening responsibility for the conduct of the press on a p rson declaring in respect of matters where public intere ts are involved Hence where a book complained of as seditious or libellous is printed in a press the Court performing the funct ons of a jury may presume that the owner had a hand in the printing and was aware of the contents and character of the book But whether such a presumption is warranted in any individual case must depend upon its own facts and circumstances The presumption however i not conclusive it is not one of law but of fact, and it is op n to the ac used to rebut it

APPEAL from conviction and sentence recorded by K R Bomanji, District Magistrate of West Khandesh

The accused Shankar S Deo mad a declaration under section 4 of the Press Act, 1867, that he was the owner of a printing press called the 'Atmaram Pr ss" As a matter of fact, he took no part in the manag em nt of the press, which was looked after by another person

At this press, a book styled "Ek Shloki Gita" was published It was written by one Keshav Narayan Damle The book purported to be an extended commentary on a single verse from the *Bhagvad Gita* The author of the book was a Sanyasi and the book it elf consisted of religious and philosophical discussions interspersed with seditious passages

It was not shown at the trial that the accused had ever read the book or was aware of its contents The accused was, upon these facts, tried or an offence of publishing a seditious book, under section 124A of the Indian Penal Code and was convicted and sentenced to undergo simple imprisonment for two months and to pay a fine of Rs 200 He was convicted on the following grounds —

Now as regards the accused No 2 That he is one of the owners of the press and has made a declaration to that effect is not denied He pleads that he took no part in the management of it Now it must be remembered that this accused is one of the leading pleaders in Dhulia so that he cannot say he had not more than the ordinary man's knowledge of the responsibility of his position

If a man makes a declaration under section 4 of the Press Act of 1867 that he is the owner what does the declaration amount to? The learned pleaders on both sides have not been able to help me with any cases decided on this point There are no doubt under sections 5 and 7 of the Act but not under section 4 It is contended on behalf of No 2 that unless it can be proved that the accused had read the book and knew it to be seditious then and then only can he be held liable Sections 5 and 7 of the Press Act apply to newspapers and not to books But if the owner of a press prints a book which is seditious is he liable or not? In Tilak's case quoted at I L R 22 Bombay page 129 Justice Strachey accepted the ruling of the Chief Justice of Calcutta that a man who uses any printed matter in any way for the purpose of exciting feelings of disaffection is liable under section 124A whether he is the actual author or not Looking to the wording of section 124A Indian Penal Code I must hold that a man who causes seditious matter to be printed uses words which would create disaffection or attempts to do so and must be held responsible for his conduct Even the so called informal manager of the press owned by the accused No 2 has admitted that if the accused had directed that the book was not to be printed he would have had to follow his order I must hold then that the responsibility for printing the work must lie with the owner who made the declaration and he cannot say that the author and he alone must be held responsible

It might be urged that the accused No 2 did not read the book If so it seems to me that he failed to do what he ought to have done and cannot escape the responsibility of his position on the ground of his own neglect A good deal has been said about the difference in the wording of the declaration under sections 4 and 5 The reason is obvious In the case of a book the author's name appears on the book or is registered in the case of a newspaper or periodical the writer's name very often is not disclosed

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The accused appealed to the High Court

Weldon, with *C A Rele* and *P B Shingne*, for the accused

The evidence adduced by the prosecution does not establish any intention on the part of the accused to excite disaffection and *is not sufficient to support the conviction under section 124A* of the Indian Penal Code The onus of proving that he had knowledge of the seditious character of the book lay on the prosecution That onus is not discharged

The mere fact that the accused made a declaration under section 4 of the Press Act, 1867, cannot render him criminally liable for a book published at his press without his knowledge There is a distinction between section 4 and section 5 of the Act The latter deals with the case of the printer and publisher of a periodical, whilst the former deals with the proprietor of a press Section 7 of the Act should be read with section 5 and not with section 4 That section renders the printer and publisher of a periodical liable for its contents That presumption cannot be drawn against a person making a declaration under section 4 and the prosecution should prove affirmatively that he had the knowledge

G S Rao, Government Pleader for the Crown

The accused is the registered proprietor of the press He has control over the press and is liable for what is going on there *He cannot escape liability by relegating his duties to a manager* The responsibility of printing a book lies with the owner who makes a declaration under section 4 of the Press Act See *Emperor v Bhaskar*[1], Odgers on Libel and Slander, pages 139, 140

CHANDAVARKAR, J —The seditious character of the publication called the "Tk Shloki Gita", has not been disputed by Mr Weldon in arguing this appeal on behalf of his client, who has been convicted by the District Magistrate of West Khandesh under section 124A of the Indian Penal Code The petitioner made a declaration under section 4 of the press Act XXV of 1867, that he was the owner of a certain Press called the "Atmaram Press", where the book in question was printed The District

(1) (1906) 33 Bom 4.1

Magistrate has held mainly on the strength of that declaration, and one or two other circumstances, that it must be presumed that the petitioner was aware of the seditious character of the book and that he did take part by its publication in bringing Government into contempt.

A declaration, made under section 4, is intended by the legislature to have a certain effect, namely, that of fastening responsibility for the conduct of the press on the person declaring in respect of matters where public interests are involved. Therefore, when a book complained of as seditious or libellous is printed in a press, the Court performing the functions of a jury may presume that the owner had a hand in the printing and was aware of the contents and character of the book. But whether such a presumption is warranted in any individual case must depend upon its own facts and circumstances. The presumption I have spoken of as one that may be drawn is not conclusive; it is not one of law, but of fact, and it is open to the accused to rebut it. By what I am saying, I do not wish it to be understood that registered owners of printing presses, who have made declarations under section 4 of the Act, can lightly escape from the responsibility which they have taken upon their shoulders by means of that declaration. The law would not require an owner to make a declaration for nothing. The object is to create a sense of responsibility, so that if any public mischief occurs owing to any action or conduct of the press, the law can at once know who must *primâ facie* be held responsible for it. While that is so, on the other hand, the Courts should be careful to draw no inference of guilt against the declarant from the mere fact of declaration but must consider the surrounding circumstances and probabilities to enable them to arrive at a conclusion whether the declarant had a hand in the printing and publishing so as to bring him within the operation of section 124A of the Indian Penal Code, where the charge is under that section.

Now, in the present case there is the declaration to start with, and if it had stood alone, I should have presumed the guilt of the appellant, especially when there is the proved fact that the writer of this seditious publication has been his friend. But

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there are other facts and circumstances to be considered, which make it reasonably doubtful whether the appellant had ever read the book, and had acquainted himself with the nature of it either before or after it had been printed When the writer of the book sent it to the press for printing, he corresponded, not with the present appellant, but with one Randive, the manager, and another person, by name Killedar, also employed in the press It is true that the writer deposited Rs 300 with the appellant to defray the expenses of the printing but from that circumstance it does not necessarily follow that the appellant had read the book or had been informed of its character and contents After the printing work had been done by the press, the appellant appropriated the whole sum of Rs 300 towards the printing charges, and then ensued a dispute between the writer and the press The writer appealed to the appellant and urged that, when he had deposited Rs 350, it had been understood that Rs 300 only were to be for the printing charges and that Rs 50 were to be reserved for the writer's private expenses The appellant declined to be moved by any consideration of that kind and gave the writer to understand that as it was a purely business transaction, he could not allow his "love" for him as a friend to interfere in a matter of profit and loss concerning the press Had the appellant been aware of the seditious character of the publication and undertaken its printing in his press with the object of propagating disloyal ideas and fostering a sense of hatred of the Government, it is probable that he would not have adopted this tone of a business man while writing to the writer of the publication and insisted on getting every penny out of the job That is how it strikes me—unless I must assume that the appellant, having joined the writer in the printing and publication, with sedition as their object, turned round against his own friend But I do not think we ought to assume that in at least a criminal case, where we have the further fact to consider, and that is with reference to the principal features of the publication It is not only seditious, but, in my opinion, it is also venomous, and the venom is all the more dangerous because it is presented to the reader in the garb of metaphysics, philosophy, and religion, which so readily appeal even to the

average Hindu intellect At the outset the writer takes a single verse from the *Bhagvad Gita*, where Krishna clinches his whole argument on the subject of devotion to duty with the advice to Arjun to gird himself for war and fight with his enemies The writer of this publication puts his own gloss on the verse He explains it to mean that we should make war with ourselves in the faithful discharge of our daily duties That seems a very innocent gloss, but, as he proceeds, after sixteen pages he brings out his main object in publishing the book in one sentence He says —"Swarajya cannot be obtained without victorious war" Having let the venom out in that way he takes to his philosophical strain again until he comes to page 69 where again a distinctly seditious utterance is found Thus at fairly long intervals he brings out in the book his libels aimed against the Government and there he intersperses them with his views on philosophy and religion No reader is likely to detect this dangerous character of the book unless he reads it carefully through, and follows the somewhat abstruse reasoning, which runs through the pages, with close attention I do not mean that the philosophy and religion found in the pages are of a solid character or such as to give one a high opinion of the writer's intellectual capacity But it is a book written deliberately with the object of presenting two faces to the reader—one as a spiritual enlightner and the other as an enemy of the Government The former is in evidence on every page, the latter comes in occasionally

In this state of the facts I do not think it would be safe to presume that the appellant was aware of the real nature of the book The cumulative effect of the surrounding circumstances I have dwelt upon is such as to make it as probable that the appellant had not read the book as that he had known its seditious object The evidence being thus evenly balanced and equivocal, a reasonable doubt arises as to the guilt of the appellant, the benefit of which must be given to him

For these reasons the conviction and sentence must be reversed, and the appellant acquitted The fine, if paid must be refunded.

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HEATON, J —The accused in this case was charged under section 124A of the Indian Penal Code, to put it briefly, with exciting or attempting to excite disaffection No exciting of disaffection is proved No attempt has been made to prove it as it very seldom is, in these cases The substantial charge therefore is one of attempting to excite disaffection In *Emperor v Ganesh Balvant Modak's* case[1] which came before us, some time ago, we held that an attempt to do a thing must necessarily involve some intention, for a man cannot be said to attempt to do that which he has absolutely no knowledge of doing, and no intention to do Applying that principle here it is impossible to convict the appellant under section 124A, unless we find that he had an intention of exciting disaffection The evidence has been considered by the Magistrate and he came to the conclusion that there was this intention This conclusion he reached by a series of presumptions, a method to which I know of no objection on principle, but one which needs careful treatment in practice To me it seems that the evidence falls very far short of proving intention even by a process of presumptions It does seem to be true that the appellant took some active part in the negotiations with the author of the book, and certainly had knowledge that that book was being printed at the press, of which he was the registered proprietor But the established facts show that the press printed the book at the cost, for the benefit and on account of the author, and they do not suggest that the book was one which would be read on behalf of the press proprietors, before it was printed If however the book were obviously a seditious publication, and were one, the sedition in which would be patent even to a casual reader, the condition of things in this case would be very different from what it is But we have here a book of considerable length a book that I should imagine is very hard reading It deals with philosophical and religious questions No doubt sedition is there, but it is occasional, and it is interspersed in one or two sentences in one place, and one or two sentences at another, frequently at long intervals It would take very careful reading of that book to enable the reader to realise that he was perusing

(1) (1909) 34 Bom 378

a seditious publication That being so I am not prepared to go any where near the length of presuming that the accused had any knowledge whatever that the book which was being printed at his press was a seditious publication Finding myself unable to make that presumption, it seems to me that I am bound to agree with the conclusion that he must be acquitted of the charge on which he has been tried

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Conviction set aside

R R

CRIMINAL REVISION

Before Mr Justice Chandavarkar and Mr Justice Heaton

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Presidency Towns Insolvency (Act III of 1909) sections 17 103 and 104—Adjudged insolvent—Criminal proceedings against the insolvent—Penal Code (Act XLV of 1860) section 421—Sanction of Insolvency Court not obtained—Jurisdiction of Magistrate— Suit or other legal proceeding' interpretation of

A person in insolvent circumstances applied to the Insolvent Debtors Court at Bombay for relief under the provisions of the Presidency Towns Insolvency Act 1909 and was adjudicated an insolvent Ten days later a creditor of the insolvent without having obtained any sanction from the Insolvent Debtors Court filed a complaint against the insolvent in the Presidency Magistrate s Court for an offence punishable under section 421 of the Indian Penal Code 1860 It was contended that the Magistrate had no jurisdiction to entertain the complaint

Held, that the Magistrate s jurisdiction to try the insolvent for an offence under section 421 of the Indian Penal Code 1860 was not taken away by any thing contained in the Presidency Towns Insolvency Act 1909

The expression " or other legal proceeding' in section 17 of the Presidency Towns Insolvency Act , 1909 coming after the word suit ' a word of more limited application must be construed on the principle of *ejusdem generis* It, therefore, includes only proceedings of a civil nature

THIS was an application for revision of an order passed by Chunilal H Setalvad, Acting Third Presidency Magistrate of Bombay

* Criminal Application for Revision No 177 of 1910

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The accused No 1 Mulshankar was the proprietor of a th trical company called the "Kathiawad Natak Mandali," wh was in embarrassed circumstances

The paraphernalia of the company, consisting of sce sceneries, dresses, &c, was first pledged to two merchants Ahmedabad on the 3rd September 1909 for Rs 7,500 the 5th April 1910 the accused No 1 executed an assignm of the paraphernalia of the company for Rs 10,000, to Chhotalal Mulchand (accused No 2) Out of the sum so obtain accused No 1 paid Rs 7,950 to the Ahmedabad merchants, the remaining Rs 2,050 were spent in paying off the arrear salary of some of the actors and servants of the company

Owing to the pressing demands of his other creditors, accused No 1 filed his petition in the Court for the Relief Insolvent Debtors at Bombay on the 19th April 1910, and was adjudged an insolvent the same day

On the 29th April 1910, one Ambalal Nathaji a creditor accused No 1, presented a complaint in the Court of the Act Third Presidency Magistrate of Bombay, against accused No for an offence punishable under section 421 of the Indian Pe Code and against Chhotalal and his brother (accused Nos 2 3) for offences punishable under sections 421 and 119 of Code

The accused contended before the Magistrate that he had jurisdiction to entertain the complaint, as the complainant not obtained leave of the Insolvency Court under section 17 the Presidency Towns Insolvency Act, 1909

The Magistrate took up the preliminary question as to jurisd tion first, and held that he had jurisdiction to hear the case

The accused applied to the High Court under its criminal visional jurisdiction

F S Talyarkhan, instructed by Messrs *Ardeshir, Hormu Dinshaw & Co*, for accused No 1

The new Insolvency Act enables the Insolvency Court to into questions which are identical with those which can be go into in a complaint under section 421 of the Indian Penal Co

1860 The Act leaves the complete control over the insolvent in the hands of the Insolvency Court It defines the offence (section 103), and provides for the procedure and punishment (section 104)

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If proceedings can be taken both under the Act and the Indian Penal Code an insolvent is liable to two prosecutions about the same subject matter and at almost the same time

Lastly, when an act is made punishable by two Acts, one general and the other special, the sentence should be passed under the latter see *Kuloda Prosad Majumdar* v *The Emperor*[1], *Lee* v *Dangar, Grant & Co*[2]

Velinkar, instructed by Messrs *Ardeshir, Hormasji, Dinshaw & Co*, for accused Nos 2 and 3

The general rule of *ejusdem generis* is subject to this reservation that if the words that follow a word of limited sense are intended to be used in a wider sense, then that sense must be assigned to them The words "or other legal proceedings" in section 17 of the Presidency Towns Insolvency Act, 1909, are so used and they include criminal proceedings

If this were not so, then it would be open to any creditor of an insolvent to go to a Criminal Court and by adopting criminal proceedings against the latter to extort payment from him It would thus leave an engine of oppression in the creditor's hands

Binning, with *B J Dhondi* and *D G Dalvi*, for the complainant

The words "or other legal proceedings" in section 17 of the Presidency Towns Insolvency Act, 1909, following the word "suit" refer only to civil proceedings This becomes clear when they are contrasted with the words "or other proceedings" in section 18 of the Act The former section was enacted to settle doubts that had arisen regarding the interpretation of section 49 of the old Act see *Hookamchand* v *Nowroji*[3]

(1) (190) 11 C W N 100 (2) (1892) 2 Q B 33

(3) (1907) 10 Bom L R 315

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The Act makes a clear distinction between offences under sections 421, 424 of the Indian Penal Code and section 103 of the Act see section 79, clause (2), and section 39 The terms of section 103 are not the same as those of section 421, and there is difference even as to punishments

It is a principle of law that the general law is not avoided unless there is an express repeal of it under the special Act See Maxwell (3rd Edn), pp 469, 255, 256, 113, *Chandi Pershad* v *Abdur Rahman*[1], *Proceedings of the High Court, dated 22nd February 1876*[2], and *The Queen* v *Ramchandrappa*[3]

Talyarkhan, in reply

The offence under section 421 of the Indian Penal Code is the same as that under section 103 of the Insolvency Act, and it would be undesirable to punish a man twice over for the same offence

Velinkar, in reply, referred to *In re Meghraj Gangabux*[4]

CHANDAVARKAR, J —The three petitioner are being prosecuted on the complaint of a creditor of the first petitioner in the Court of the Third Presidency Magistrate, Bombay, the charge against the first petitioner being an offence under section 421 of the Indian Penal Code and the charge against the other two being abetment thereof The first petitioner was adjudged insolvent under the Presidency Towns Insolvency Act (III of 1909) ten days prior to the institution of the complaint It was urged for them before the learned Magistrate by way of preliminary objection to the complaint that his jurisdiction to try them for an offence under section 421 of the Indian Penal Code was excluded by the provisions of the Presidency Towns Insolvency Act and that the only Court which was competent to entertain a complaint of the offence was this Court exercising insolvency jurisdiction under the Act The preliminary objection having been overruled by the Magistrate, the petitioners ask this Court to quash his order and proceedings in the exercise of its revisional jurisdiction

(1) (1894) 22 Cal 131
(2) (1876) 1 Mad 55
(3) (1883) 6 Mad 249
(4) (1910) See ante p 47

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First it is contended that the Magistrate's jurisdiction is excluded because no leave of the Insolvency Court under section 17 of the Presidency Towns Insolvency Act has been obtained for the institution of the criminal proceedings in the Magistrate's Court That section provides that "on the making of an order of adjudication no creditor to whom the insolvent is indebted in respect of any debt provable in insolvency shall, during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or shall commence any suit or other legal proceeding, except with the leave of the Court and on such terms as the Court may impose" By the complaint filed in the Magistrate's Court the creditor here concerned is not asking for "any remedy against the property' of the first petitioner Nor is the criminal proceeding initiated in that Court a suit But it is urged that it falls within the more general expression "or other legal proceedings' That general expression, coming after "suit", a word of more limited application must, in my opinion, be construed on the principle of *ejusdem generis* It was said that such construction was opposed to the general scheme of the Act, which is to give complete control to the Insolvency Court over matters, both civil and criminal, affecting the property and the person of an adjudged insolvent Where the Act creates an offence it is the Insolvency Court which has jurisdiction as to it, and as to offences under the Penal Code, the ordinary jurisdiction of the Criminal Courts cannot be held to be excluded unless expressly or by necessary implication the Act repeals the Code for the purposes of those offences

The question, therefore, is whether there is anything in the Act which repeals section 421 of the Indian Penal Code We have at the outset section 39 of the Act which directs that "the Court shall refuse the discharge in all cases where the insolvent has committed any offence under this Act, or under sections 421 to 424 of the Indian Penal Code" Then section 79 of the Act makes it the duty of the Official Assignee "to investigate the conduct of the insolvent and to report to the Court upon any application for discharge, stating whether there is reason to

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believe that the insolvent has committed any act which constitutes an offence under this Act or under sections 421 to 424 of the Indian Penal Code in connection with his insolvency' and "*to take such part and give such assistance in relation to the prosecution of any fraudulent insolvent as the Court may direct or as may be prescribed* ' This language is consistent only with the preservation of the jurisdiction of the ordinary Criminal Courts as to the offences under sections 421 to 424 of the Indian Penal Code These sections, so far from being repealed, are recognised by the Act as being operative and the prosecution of the insolvent for the offences created by them is distinctly contemplated by the Act

The only section of the Act which is relied upon as in effect *repealing section* 421 of the *Indian Penal Code and substituting* therefor, a new offence, created by the Act and made triable only by the Insolvency Court, is section 103 But that section does not substantially interfere with section 421 of the Code As its essential ingredients show, it is more or less a new offence created by the Act in addition to the offence under the Code

What are the ingredients of the offence under section 421 of the Penal Code as contrasted with those of the offence under section 103, clause (*b*), sub-clause (ii) of the Presidency Towns Insolvency Act, with which we are here concerned ? First, the act complained of must, under section 421 have been done "dishonestly or fraudulently," whereas the offence to fall within section 103 of the Act requires only the element of fraud and dispenses with that of dishonesty It is true that at least one element, that of dishonesty, is common to both, and it may be conceded that there are also some common elements in both as to the act itself, constituting the offence For instance, the act contemplated in section 421 of the Code consists in (1) the removal of the property or (2) its concealment or (3) its delivery to any person, or (4) its transfer or the causing of its transfer to any person, without adequate consideration The offence under section 103 of the Act brings in a few of these elements, namely, removal, concealment and transfer But it must be a transfer of a limited kind, it has to be by way of charge or mortgage only

Then again, under section 421 of the Code the transfer must be "without adequate consideration", but that element is absent in section 103, according to which it is immaterial whether the transfer by way of charge or mortgage is supported or not by adequate consideration

These differences between the two sections are intensified when we come to the question of intention as an essential element of the offence constituted by each of the sections The intention required by section 421 of the Code is that the act must be done to prevent or with knowledge that it is likely to prevent the distribution of property according to law among the creditors of the offender or the creditors of any other person, whereas the intention in section 103 of the Act is not the distribution but either the diminution of the sum to be divided among the insolvent's creditors or the giving of an undue preference to any of the said creditors Distribution need not necessarily have the effect of diminution in all cases, and there may be undue preference, which does not necessarily interfere with the distribution

So also as to the penalty provided by either section The punishment for an offence under section 421 of the Code is two years imprisonment of either description, or fine, or both, that under section 103 is only two years' imprisonment

It may be that in some cases the facts proved may bring about elements common to both the sections, but that is not enough to create repugnancy between them The repugnancy or contrariety must be substantial and must clearly arise out of the general features of the two sections "Every affirmative statute is a repeal of a precedent affirmative statute where its matter necessarily implies a negative but only so far as it is clearly and indisputably contradictory and contrary to the former Act in the very matter, and the repugnancy such that the two acts cannot be reconciled" (Dwarris on Statutes, 2nd Edition, pages 530 and 531) As was said by Grove, J, in *Hill* v *Hall*[1] "It is common learning that one statute may be impliedly repealed by a subsequent statute necessarily

[1] (1876) L R 1 Ex D 411,

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inconsistent with it, but then the inconsistency must be so great that they cannot both be to their full extent obeyed I do not think that in considering a question of this kind we ought to hold that a mere accidental inconsistency between two statutes amounts to a total repeal of the earlier, such a doctrine might be pushed to a mischievous extent'

On the ground, therefore that the offence under section 421 of the Indian Penal Code is substantially different from the offence under section 103 of the Presidency Towns Insolvency Act I am of opinion that the Magistrate's jurisdiction to try an adjudged insolvent for the former offence is not taken away by the latter Act

The rule must, therefore, be discharged

HEATON J —A creditor instituted against a debtor a prosecution under section 421, Indian Penal Code after an order of adjudication had been made under Act III of 1909 in respect of the debtor The leave of the Insolvency Court was not obtained to institute those criminal proceedings The question is whether the Magistrate has jurisdiction to proceed until the leave of the Insolvency Court is obtained The argument that he has not is founded on the terms of section 17 of the Act That section runs as follows —

On the making of an order of adjudication, the property of the insolvent wherever situate shall vest in the Official Assignee and shall become divisible among his creditors and thereafter except as directed by this Act no creditor to whom the insolvent is indebted in respect of any debt provable in insolvency shall during the pendency of the insolvency proceedings, have any remedy against the property of the insolvent in respect of the debt or shall commence any suit or other legal proceeding except with the leave of the Court and on such terms as the Court may impose

Provided that this section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed

It seems to me that by "other legal proceeding" is meant broadly other proceeding of a civil nature connected with the insolvent's estate This is to be inferred from the words of the section as a whole, from what is quite plainly its main intention

APPELLATE CIVIL.

Before Mr Justice Chandavarkar and Mr Justice Heaton

1910 *August* 16. THE TALUKDARI SETTLEMENT OFFICER, GUJARAT (ORIGINAL DEFENDANT) APPELLANT, v UMIASHANKAR NARSIRAM PANDYA (ORIGINAL PLAINTIFF), RESPONDENT *

Land Revenue Code (Bombay Act V of 1879) section 79A†—Gujarat Talukdari Act (Bombay Act VI of 1888)—Collector powers of—Summary eviction—Persons in wrongful possession—Possession under a decree of Civil Court—Discretion of Collector—Jurisdiction of Civil Court to examine the order

The Talukdari Settlement Officer of Gujarat in exercise of his powers as Collector under section 79A of the Land Rev nue Code (Bombay Act V of 1879) authorized the summary eviction of a person who was in possession of land under the decree of a Civil Court In a suit brought to s t aside the order —

Held, that the powers given by section 79A of the Land Revenue Code, 1879, could only be exercised in cases of wrongful possession

Held also, that no finality was given to the Collector s decision by the Land Revenue Code or the Gujarat Talukdari Act, and the jurisdiction of the Civil Court to de ide whether the person evicted was in rightful possession was not excluded

APPEAL from the decree passed by Dayaram Gidumal, District Judge of Ahmedabad

Suit for declaration and injunction

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* First Appeal No 120 of 1909

† 79A Any person unauthorizedly occupying or wrongfully in possession of any la d—

(a) to the use and occupation of which he has ceased to be entitled und r any of the provisions of this Act or

(b) of which the occupancy right is not transferable without previous sanction under section 73A or by virtue of any condition lawfully ann xed to the occupancy under the provisions of section 62 67 or 68

may be summarily evicted by the Collector

The plaintiff Umiashankar Narsiram came into possession of the lands in dispute in execution of a decree of the Civil Court

The judgment debtor sued the plaintiff for a declaration that the lands in question were a talukdari estate which could not be sold without sanction of Government under section 31 of the Gujarat Talukdars' Act, 1888 It was held that the lands were not a talukdari estate

Subsequently, the Talukdari Settlement Officer of Gujarat purporting to act under section 79A of the Land Revenue Code (Bombay Act V of 1879), gave a notice of summary ejectment to the plaintiff

The plaintiff filed a suit against the Talukdari Settlement Officer, asking for a declaration that the defendant's order was bad in law and for an injunction restraining the latter from interfering with the plaintiff's possession of the lands

The District Judge decreed the plaintiff's claim

The defendant appealed to the High Court

G S Rao, Government Pleader, for the appellant

L A Shah, for the respondent

CHANDAVARKAR, J —Section 79A of the Land Revenue Code, as amended by Act VI of 1888 (the Gujarat Talukdars' Act), confers on the Collector the power to evict summarily any person who is found in "wrongful possession" of a *talukdari* land or estate It is only in cases of wrongful possession that the power can be exercised, and though for the exercise of the power the Collector has to form his own opinion and decide whether in any particular case the possession is wrongful, there is no provision in either the Land Revenue Code (Bombay Act V of 1879) or the Gujarat Talukdari Act (Bombay Act VI of 1888) which gives finality to the Collector's order of eviction so as to exclude the jurisdiction of a Civil Court to decide that the person evicted by that order was in rightful occupation In the present case the respondent was put into possession by a competent Court of law after an adjudication that as against the *Talukdar* he (the respondent) was entitled to the land in dispute If that adjudi-

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cation and the lawful possession had in consequence of it bound the *Talukdar* as *res judicata*, it is not open to any authority, in the absence of any express provision of law, to set aside the adjudication of a competent Court as a nullity and as not binding him merely because section 79A empowers him to evict a person "in wrongful possession" The possession here was not wrongful, and on that ground I am of opinion the decree in appeal ought to be confirmed with costs

HEATON, J —Under cover of section 79A of the Land Revenue Code (Bombay Act V of 1879), the Talukdari Settlement Officer has assumed to himself the power to decide a point which had already been decided by a Court of competent jurisdiction, and further he has assumed to himself the power to decide that what the Court had declared to be right was wrong The precise point he decided was whether the Talukdar or his vendor was entitled to possession of the particular land in suit That was the identical point which had been decided by the Court Section 79A of the Land Revenue Code contemplates a reasonable ground for proceeding on the part of the Collector before he summarily evicts under that section In this case there was not a reasonable ground for proceeding It is not reasonable, under our system of administering justice for an executive officer to set at naught the decision of a competent Court and to act directly contrary to it, in a matter solely affecting the rights of the parties whose dispute had been determined by the Court I think that the Talukdari Settlement Officer was singularly ill advised in acting as he did and I think that the injunction given by the Court below is perfectly correct

Decree confirmed

R. R.

APPELLATE CIVIL

Before Sir Basil Scott, Kt, Chief Justice, Mr Justice Batchelor and Mr Justice Davar

In re GOVIND PANDURANG KAMAT*

1910 *August* 19

Undivided brothers—Instruments whereby co owners divide property in severalty—Release—Partition—Stamp

Instruments whereby co owners of any property divide or agree to divide it in severalty are instruments of partition

One of three undivided brothers agreed to take from the eldest brother, the manager of the family as his share in the family property, moveable and immoveable a certain cash and bonds for debts due to the family and passed to the eldest brother a document in the form of a release

Subsequently one of the two brothers passed to the eldest brother a document in the form of a release whereby he and the eldest brother divided the remaining family property by the latter handing over to the former securities for money

A question having arisen as to whether for the purpose of stamp duty the said two documents were to be treated as releases or instruments of partition,

Held that the documents were instruments of partition

REFERENCE by M C Gibb, Commissioner, S D, under section 59 of the Indian Stamp Act (II of 1899)

Three brothers, Govind, Waman and Anant Pandurang, were members of an undivided Hindu family Among them Govind being the eldest, he was manager of the family

On the 1st September 1909 Anant agreed to take his share in the family property from Govind and passed to him the following document which was stamped as a release —

To

Govind Pandurang Supekar of Nandagad, taluka Khanapur

Deed of release executed by Anant Pandurang Kamat Supekar of Nandagad.

Our father Pandurang Balo Kamat, now deceased, made a will on the 13th March 1899 From that day, we are living together Now there is discord between us I do not like now to live with you jointly as I did before now,

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and transacted and managed the joint ancestral property I therefore take from you my share in the property—moveable and immoveable—of the description given below —

(Here follows description of the property)

Total value Rs 13 948

I have thus taken my share in the property as detailed above and now hereby relinquish my interest as bhauband in the remaining property to you I acknowledge hereby receipt of Rs 4 004 in cash paid to me as shown above and the deeds (papers) referred to above which you have handed over to me today There is no necessity to pass a separate receipt for the same You are now the owner of all the transactions which I carried on in my name when we were living jointly You are also responsible for all the profits and losses which may result from transactions you may now carry on on your own account I will also be responsible for losses resulting from transactions which I may henceforward carry on on my own account You are not concerned in it in any way The well in the house which we occupy and the back verandah will be in our joint enjoyment I have now nothing due from you as my share in the joint property I alone will be responsible for the losses and profits in respect of the deeds given to my share I have passed this deed of release willingly Dated 1st September 1909

On the next day, that is, the 2nd September 1909, Waman passed to Govind a similar document similarly stamped It was as follows —

To

Govind Pandurang Kamat Supekar Gowd Saraswat, age 35 merchant of Nandagad

Deed of release executed by Waman Pandurang Kamat Supekar of Nandagad

Our father Pandurang Bale Kamat, now deceased made a will on the 30th March 1899 From that day we are living together Now there is a discord amongst us I do not like to live with you jointly as I did before this time I have decided to take from you Rs 12,500 in cash as my share in the property but as you have not with you such a large amount I have taken property of the description given below —

(Here follows the description of the property)

Total value Rs 40,183.

As the amount of some of the deeds cannot be recovered and as some others cannot be sued upon the whole amount of all the deeds cannot therefore be obtained I have therefore contracted to take the deeds for Rs 12 500 I am alone responsible for the profits and losses which may result from these deeds You are not concerned with them I have now relinquished my whole interest and rights as bhauband over the joint property You are now the

owner of all the transactions which I carried on in my name when we were living jointly You are responsible for all the transactions which you may now carry on on your own account I will also be responsible for mine I have received from you the deeds above described today There is no necessity for passing a separate receipt for the same I have now nothing due from you as my share in the property This deed I have executed most willingly Dated 2nd September 1909

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Both the deeds were presented to the Sub Registrar for registration He treated them to be instruments of partition and impounded them as insufficiently stamped

On appeal to the Collector the Sub Registrar's view was upheld

The matter, thereupon, went up to the Commissioner, S D, who, in making the reference to the High Court, made the following observations —

Section 2 (15) of Act II of 1899 defines instrument of partition as ' Any instrument whereby co owners of any property divide or agree to divide such property in severalty Schedule I Article 55 defines release as any instrument whereby a person renounces a claim upon another person or against any specified property

2 In the case now in question the intention was undoubtedly to effect a partition of the property The manner in which the partition was effected was that two brothers each executed separate deeds renouncing claims to remaining property in favour of a third brother on condition of receiving certain specified property The third brother did not sign either of these instruments

It was practically admitted by the pleader that the intention was to effect a partition but he contended that the third brother in whose favour the two instruments purporting to be releases were made not having signed them would not be bound by them I understand him to mean that legally the third brother while retaining the share left with him would still be able to claim a share in the property handed over to the two other brothers as a consideration for their not claiming shares in the property left with the third brother I am not in a position to say whether this contention of the pleader was well founded I find it difficult to believe that the Courts would allow what would be nothing less than a fraud

3 It will be seen that though as I have said, the intention was to effect a partition I am in doubt how far the result intended was legally effected I find it therefore difficult to give an opinion I may state however that supposing the pleader to have been wrong and the third brother to be estopped in future from getting hold of part of his brothers shares in addition to the share

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left with him then a partition was practically effected and the instruments should be held to be instruments of partition On the other hand, supposing the pleader s opinion to have been right, even then the intent of the parties being to divide the property, it would seem wrong that parties should be able to evade the payment of stamp duty by executing deeds which have the effect of a partition unless one of the persons concerned perpetrates a moral fraud

The reference came on for argument before Scott, C J, and Batchelor and Davar, JJ

T R Desai appeared for Govind Pandurang, the appellant, before the Commissioner, S D

We submit that each document must be read by itself Each is a release evidencing family arrangement *In the matter of the Maharajah of Durbhungah*[1] Section 2 (15) of the Stamp Act is not applicable

The Stamp Act is a fiscal enactment and should be construed in favour of the subject *Girdhar* v *Ganpat*[2] *The Empress* v *Soddanund Mahanty*[3]

G S Rao, Government Pleader, for the Government, was not called upon

SCOTT, C J —The question referred to us is whether the two documents, dated respectively the 1st of September and the 2nd of September 1909, are instruments of partition or release

They are instruments of partition if they are instruments whereby co owners of any property divide or agree to divide any property in severalty

By the first document Anant Pandurang agreed to take from his brother, as his share in the family property, moveable and immoveable, Rs 4,000 in cash and certain securities for money in the form of bonds securing debts due to the family The document was in the form of a release executed in favour of Govind Pandurang, the eldest brother and manager of the family The effect of the document was to divide the property of the three co owning brothers between Anant on the one hand and Govind and Waman on the other Govind took a certain share of the family assets not converted into cash and we, therefore,

(1) (1880) 7 Cal 21
(2) (1874) 11 Bom H C R 129
(3) (1881) 8 Cal 259

think that the document passed by him amounts to an instrument of partition 1910

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Similarly on the 2nd September, Waman Pandurang passed to his brother Govind a document in the form of a release whereby he and Govind divided the remaining family property by Govind handing over to Waman securities for money of the nominal value of Rs 40,183 and of the estimated value of Rs 12,500 That also in our opinion for the reasons already stated, amounts to an instrument of partition whereby the two remaining co owners divide their property in severalty

Our answer to the reference is, therefore, that both the documents are instruments of partition

Order accordingly

G B R

APPELLATE CIVIL

Before Mr Justice Chandavarkar and Mr Justice Heaton

VASUDEO ATMARAM JOSHI AND ANOTHER (ORIGINAL PLAINTIFFS) APPELLANTS *v* EKNATH BALKRISHNA THITE AND OTHERS (ORIGINAL DEFENDANTS) RESPONDENTS * 1910 *August* 23

Limitation Act (XV of 1877), articles 142 and 144—Suit to recover possession—Dispossession—Discontinuance of possession—Possession as an agent of minors—Decree by the minors on attaining majority against the agent for possession of the property—Decree not executed and barred by limitation—Agent wrongfully dispossessed by a third person—Money decree against the original owners—Decree holder seeking to attach property—Adverse possession—Civil Procedure Code (Act XIV of 1882) section 283

N died in 1879 leaving behind him two minor sons R and D, and a mistress A The latter looked after the minors and managed their property When they arrived at the age of majority they found that A claimed the property in her own right In 1891, R and D sued A for the possession of the lands and obtained a decree on the 30th of August 1892 which was confirmed on appeal on the 1[illegible]th of June 1894 This decree was sought to be executed on the 20th June 1897, but the application was dismissed as barred by limitation A was

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then wrongfully deprived of the possession of the property by V, who sold it to B in 1898. B mortgaged the property to E in 1900. In the same year the plaintiff obtained a money decree against R and D, and in execution of it he had an attachment placed on the property but the attachment was removed in 1904 at the instance of B and E. In 1905, the plaintiff brought a suit for a declaration that the property was liable to be attached and sold in execution of his decree against R and D. The defendants B and E contended that the suit was barred under article 142 of the Limitation Act 1877 inasmuch as neither the plaintiff nor his predecessors in title R and D were in possession of the property within twelve years preceding the suit.

Held, that the suit having been brought by the plaintiff, under section 283 of the Civil Procedure Code of 1882 to establish his right to attach and sell the property in dispute as that of his judgment debtors R and D in execution of his money decree all that he had to prove was that on the date of attachment the judgment debtors had a subsisting right to the property and that the suit must therefore be tried as if it were a suit for possession by the judgment debtors.

Held, also, that as A's possession must be deemed to have begun in 1879 as that of bailiff or agent for the minors R and D, and to have continued as such until after they had arrived at the age of majority, and as there had never been any dispossession by A of R and D while they had been in possession in a suit against A her plea of limitation would be decided by the application, not of article 142, but of article 144 of the Limitation Act 1877.

Morgan v. *Morgan*(1) *Taylor* v. *Horde*(2) *Lallubhai Bapubhai* v. *Mankuvarbai*(3) and *Dadoba* v. *Krishna*(4) followed.

Held further that though the decree for possession obtained by P and D against A had become incapable of execution by reason of their failure to apply to the Court for its execution within the period prescribed by the law of limitation the right established by it remained and though that right could not be enforced as against A by execution through the Court, the decree holders could enter by ousting any trespasser A included.

Bandu v. *Naba*(5) followed.

Held, therefore that there having been no allegation of possession in R and D lost by dispossession or discontinuance of possession but the case put forward having been a title in them established by their decree against A and a wrongful possession obtained from her after the decree by V under whom B and E claimed the limitation applicable to the suit was that provided by article 144, not article 142, of the Indian Limitation Act (XV of 1877).

(1) (1737) 1 Atk. 489
(2) Sm. L. C. Vol. II (10th Edn.) pp. 644, 646
(3) (1876) 2 Bom. 388 at p. 419
(4) (1883) 7 Bom. 34
(5) (1890) 15 Bom. 238

Faki Abdulla v *Babaji Gungaji*(1) and *Ganga ayal Nagu Kaval Mhatra* v *Nago Dhaya Mhatra* (2), followed

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Per HEATON J —Article 142 of the Indian Limitation Act (XV of 1877) has no application to claims which neither in terms nor in substance are claims to possession made necessary by reason of dispossession or discontinuance of possession It is a general principle that anyone suing in ejectment must prove possession within twelve years the reason for this, however is that possession is commonly the effective assertion of title which is relied on but it is not the only one There is another which in some cases is equally good and that is an assertion of title made in Court and established by a decree That is good against those who are party defendants to the suit, and if the same title is re asserted and made good in a later suit against other opposing parties it is good against them also and entitles to possession whether the title claimant has or has not been in possession within twelve years unless the opponent can defeat the title by adverse possession

APPEAL under the Letters Patent against the decision of Scott, C J, which reversed the decree passed by Vaman M Bodas, First Class Subordinate Judge with Appellate Powers at Sholapur, and restored the decree passed by C R Karkare, Subordinate Judge at Pandharpur

This was a suit brought by a decree holder to establish his right to attach and sell certain property as belonging to his judgment debtors, brought under the provisions of section 283 of the Civil Procedure Code (Act XIV of 1882)

The decree in question was a money decree obtained in 1900 by Atmaram (the plaintiff) who having died was represented in these proceedings by his two sons, Vasudeo and Shankar, the appellants In execution of this decree the plaintiff attached certain lands as belonging to his judgment debtors, Ramchandra (defendant No 3) and Dnyaneshwar (father of Kondi, defendant No 4), Eknath (defendant No 1) intervened in those proceedings by putting forth his title to the property The Court consequently raised the attachment on the 20th September 1904

The claim which Eknath advanced against the property in dispute arose under the following circumstances The property originally belonged to one Namdeo (father of Ramchandra and Dnyaneshwar) He died in 1879 leaving him surviving his two

(1) 1890) 14 Bom 458 (2) (1887) P J 212

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minor sons above named, and a mistress by name Ambu After his death, Ambu brought up the minors and managed their property When both the minors attained majority, they asked Ambu to deliver the property to them She declined to do so claiming the property in her own right The two sons, Ramchandra and Dnyaneshwar, sued her in 1891 to recover possession of the property, which included the lands now in dispute The suit terminated in a decree passed in the plaintiff's favour on the 30th August 1892 It was confirmed on the 15th June 1894 by the appellate Court The decree holders Ramchandra and Dnyaneshwar applied to execute this decree on the 26th June 1897, but it was dismissed as barred by limitation having been made more than three years after the date of the decree Ambu meanwhile continued in possession till 1898, when she was wrongfully dispossessed by a trespasser one Vithal, a cousin of Ramchandra and Dnyaneshwar Vithal sold the lands to Bhau (defendant No 2) on the 20th July 1898 Bhau mortgaged the same with Eknath (defendant No 1) on the 1st August 1900

The plaintiff Atmaram filed this suit on the 3rd July 1905 under the provisions of section 283 of the Civil Procedure Code (Act XIV of 1882) to obtain a declaration that the lands in suit were liable to attachment and sale in execution of his money decree against Ramchandra and Dnyaneshwar, and that Vithal, Bhau and Eknath had no interest in the lands

Ramchandra and Dnyaneshwar's son Kondi (defendants Nos 3 and 4) were absent

Eknath and Bhau (defendants Nos 1 and 2) contended in their written statement that Vithal had purchased the lands from Namdeo and was in possession of them as owner since 1879, that they themselves were in possession from 1898, and that as Ramchandra and Dnyaneshwar were out of possession from 1879, their claim was extinguished and the right of the plaintiff was barred by limitation

The Subordinate Judge held that the sale by Namdeo to Vithal in 1879 was not proved, and that Vithal was not shown to have been in possession since 1879 He further held that Vithal's

adverse possession commenced in 1898, when he stepped into possession by wrongfully ousting Ambu, and dismissed the plaintiff's claim

This decree was reversed on appeal by the lower appellate Court The defendants Nos 1 and 2 appealed to the High Court

The appeal was heard by Scott, C J, who reversed the decree passed by the lower appellate Court and dismissed the suit The judgment delivered by his Lordship ran as follows

SCOTT, C J —This is a suit brought by the plaintiff under the provisions of section 283 of the Civil Procedure Code of 1882 for the purpose of determining the respective rights of the 3rd and 4th defendants the plaintiff's judgment debtors, on the one hand and the 1st and 2nd defendants, the persons in possession, on the other hand in certain immoveable property attached by the plaintiff

The material facts are that the property belonged to one Namdeo, father of the 3rd, and grandfather of the 4th, defendant till his death in 1879, thereafter it remained in the possession of Ambu who was his mistress and who attended to the wants of the 3rd defendant and Dnyaneshwar, father of defendant 4, during their minority In 1891 the 3rd defendant and Dnyaneshwar sued Ambu for possession of eight survey numbers five of which, she alleged, had been bequeathed to her by Namdeo and three of which including the land, the subject of this suit, she alleged that she held as tenant of Namdeo's brother Appaji The first Court decided against Ambu as regards all the plots She appealed as to the plots alleged to have been bequeathed to her but did not press her claim as to the other plots The appellate Court in 1894 confirmed the decreee as to these plots but dismissed the suit as regards the plots claimed by bequest

The plaintiffs in that suit had, therefore, a decree for possession of three survey numbers, which included the land, the subject of this suit They, however, failed to execute the decree within three years and their remedy against Ambu thus became barred in 1897 In 1898 Vithal Appaji, a nephew of Namdeo, wrong-

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fully dispossessed Ambu and sold the land to defendant No 2 The defendant No 1 is mortgagee of defendant No 2

The plaintiff, a judgment creditor of defendants Nos 3 and 4, attached the land but on the application of defendants Nos 1 and 2 it was released under section 280 of the Code of 1883

The plaintiff now sues for a declaration that the land in suit, described in the plaint, is liable to attachment and sale, in execution of decree No 234 of 1900, obtained by him, against the defendant No 3 and deceased Dnyaneshwar, the father of defendant No 4, and that the defendants Nos 1 and 2 and their vendor Vithal Appaji Velapure, have no interest in that land, together with cost of suit

This in substance raises the question which could arise, on a purchaser under a Court sale under plaintiff's decree trying to obtain possession of the land in suit from the defendants Nos 1 and 2 who are admittedly in possession and, it is contended by the appellants' pleader that this suit must be tried as if it were a suit for possession between the defendants Nos 3 and 4 and defendants Nos 1 and 2 falling under article 142 of the Limitation Act This contention is, I think, correct as the title of the judgment debtors comes from Namdeo and the defendant No 3 and his brother Dnyaneshwar were out of possession when they sued Ambu in 1891

It is clear law that defendants Nos 1 and 2 cannot tack to their seven years' possession the possession of Ambu whom they have dispossessed See Pollock and Wright on Possession, page 98, and *Lakshman* v *Vithu*[1]—but although they cannot prove adverse possession for twelve years they are entitled to insist that the plaintiff should establish possession by the defendants Nos 3 and 4 within twelve years of suit The plaintiff's pleader seeks to satisfy this condition by pointing to the abandonment by Ambu in her appeal of her contention with regard to the property in suit That, however, is not proof of the possession of the plaintiff's judgment debtors in 1894 Her surrender upon that point resulted in the affirmation of their decree for posses

(1) (1895) P J 216

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sion as regards the property now in question, but the facts found show that they never got possession by executing their decree They and those claiming under them would, therefore, fail in a suit for possession falling under article 142 and this suit for the same reason must be dismissed

I, therefore, reverse the decree of the lower appellate Court and dismiss the suit with costs throughout

The plaintiff's legal representatives, his sons, appealed from this decision under the Letters Patent

Nadkarni, with *M V Bhat*, for the appellants —

The case is governed by article 144, not by article 142, of the Limitation Act, 1877, as defendants Nos 1 and 2 did not set up a case of possession and dispossession by way of defence See *Talshibhai* v *Ranchhod*[1], *Ganga* v *Nago*[2], *Harishankar* v *Karsan*[3], *Radha Gobind Roy* v *Inglis*[4], *Rao Karam Singh* v *Rajah Bakar Ali Khan*[5] *Pandurang Govind* v *Balkrishna Hari*[6], *Hanmanta* v *Mahadev*[7], *Faki Abdulla* v *Babaji Gungaji*[8], *Parmanand* v *Sahib Ali*[9], and *Muhammad* v *Ghulam*[10] The view taken in the decision appealed against as to the applicability of article 142 is opposed to the weight of authorities See *Gobind Lall* v *Debendronath*[11], *Sheikh Sohnun* v *Hutlwan*[12] On the question of dispossession or discontinuance of possession the following cases were cited *Rains* v *Buxton*[13], *Morgan* v *Morgan*[14], *Howard* v *Earl of Shrewsbury*[15], *Taylor* v *Horde*[16] *Leigh* v *Jack*[17], *M'Donnell* v *M'Kinty*[18], *Smith* v *Lloyd*[19]

Ambu's adverse possession commenced, if at all, in 1897, when the decree for possession obtained against her became barred by time Nevertheless the right of ownership remained and the title continued with the owners Ramchandra and Dyaneshwar

(1) (1902) 26 Bom 449
(2) (1887) P J 242.
(3) (1893) 18 Bom 260
(4) (1880) 7 C L R 364
(5) (1882) 9 I A 99
(6) (1869) 6 B H C A C J 125
(7) (1893) 18 Bom. 513
(8) (1890) 14 Bom 458
(9) (1889) 11 All 438 at p 447
(10) (1884) P R No 49 of 1884 p 121
(11) (1880) 6 Cal 311
(12) (1896) 1 C W N 247
(13) (1880) 14 Ch D 537
(14) (1737) 1 Atk 489
(15) (1874) 17 Eq 378.
(16) (1757) 1 Burr 60
(17) (1879) 5 Ex D 264
(18) (1847) 10 Ir L R 514.
(19) (1854) 9 Exch, 562

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See *Bala* v *Abai*[1], *Rani Hemanta* v *Maharaja Jagindra Nath Roy*[2] The defendants Nos 1 and 2 cannot get higher rights than Ambu against whom the article applicable would be article 144 and not article 142 of the Limitation Act (XV of 1877) See *Lalubhai Bapubhai* v *Mankuvarbai*[3] and *Dadoba* v *Krishna*[4]

P P Khare for the respondents —

The decision appealed against is in accord with the Privy Council case of *Mohima Chunder* v *Mohesh Chunder*[5] Article 144 is a general article and applies only where no other article applies to the case In a suit to eject trespassers, the plaintiff, in order to succeed, has to show that he, or the person under whom he claims, has been in possession of the property within twelve years of the date of the suit See *Gopaul Chunder* v *Nilmoney Mitter*[6], *Rao Karan Singh* v *Rajah Bakar Ali Khan*[7], *Mahomed Ali Khan* v *Khaja Abdul Gunny*[8], *Mirza Shamsher Bahadur* v *Munshi Kunji Behari Lal*[9]

The judgment debtors' title was questioned by Ambu in 1891, when they instituted a suit against her to recover possession of the property Her adverse possession dated therefore from 1891, and any suit to dispossess her would become time barred in 1903 Ever since 1891, Ambu claimed and retained the property in her own right The judgment debtors having been out of possession for more than 12 years before suit, they were barred by article 142 from putting forth any claim to the lands in dispute

Nadkarni, in reply, cited *Jagatjit Singh* v *Sarabjit Singh*[10] and *Amrita Rauji* v *Shridhar*[11]

CHANDAVARKAR, J —The question of law for determination in this appeal is whether the suit brought by the father of the appellants, since deceased, to establish his right to attach and

(1) (1908) 11 Bom L R 1093
(2) (1906) 8 Bom L R 400
(3) (1876) 2 Bom 388
(4) (18 9) 7 Bom. 34
(5) (1888) 16 Cal 473
(6) (18 4) 10 Cal 574
(7) (1882) 9 I A 99
(8) (1883) 9 Cal 744
(9) (1907) 12 C W N 273
(10) (1891) 19 Cal 159
(11) (1909) 11 Bom L R 31

sell the property in dispute in execution of a money decree is, for the purposes of limitation, governed by article 142 or article 144 of Schedule I to the Limitation Act

That question turns upon the following facts, which are not in dispute

The father of the appellants, having obtained a decree for money against the 3rd respondent Ramchandra Namdeo and his brother Dnyaneshwar Namdeo, deceased, represented by his son Kondi, in suit No 234 of 1900, attached the lands in dispute in execution as belonging to his judgment debtors

The 1st respondent Eknath Balkrishna, thereupon intervened and applied to have the attachment raised on the ground that the land had belonged originally to one Vithal, who had sold it to the 2nd respondent, and that the latter had mortgaged it to the intervenor (the 1st respondent) The application having been allowed, the appellants father brought the suit which has given rise to the present appeal, for a declaration that the lands in dispute were liable to be attached as those of his judgment debtors, the 1st respondent and Dnyaneshwar

The defence was that the 2nd respondent's predecessor in title, one Vithal, had acquired a title to them by purchase from the father of the appellants' judgment debtors in 1878, and that the title of the latter was barred by limitation

The Courts below have found the purchase not proved So the other defence, that of limitation alone remains

On that question it is found as a fact by those Courts that Vithal got into possession without any title only in 1898, so that the respondents who claim under him and resist the appellants' right to attach and sell the property as belonging to their judgment-debtors, are mere trespassers. But it is contended for those respondents that, though they have acquired no title to the property by adverse possession for the statutory period of 12 years, the appellants are not entitled to succeed and recover possession unless they prove possession within twelve years next preceding this suit brought in 1905

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And they maintain that, on the facts found by the lower Courts, the appellants were not in possession either by themselves or through their predecessors in title within the 12 years contemplated by article 142 of Schedule I to the Limitation Act The facts are these The property belonged to Namdeo who died in 1879, leaving two sons, the 3rd respondent and his brother Dnyaneshwar (represented now by the 4th respondent), who were then minors On Namdeo's death, his mistress Ambu, who had lived with him, took charge of his minor sons administered to their wants, and entered into possession of the property, including that now in dispute which they had inherited from their father When they arrived at the age of majority, they found that Ambu claimed the property in her own right

In 1891 the 3rd respondent and his brother Dnyaneshwar sued Ambu for possession of the lands and obtained a decree on the 30th of August 1892 That decree was confirmed in appeal on the 15th of June 1894 On the 26th of June 1897 the appellants' father applied for its execution, but the application was dismissed as barred by limitation and execution was refused

Relying on these facts, the 1st and 2nd respondents urge that, from at least 1891 to 1897, Ambu was in possession, that from 1898 Vithal and after him they have been in possession, and that, therefore, the appellants judgment debtors have been out of possession for more than 12 years next preceding the suit

That would be so, if article 142 of Schedule I to the Limitation Act applied That article contemplates a suit "for possession of immoveable property, when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession" The present suit has been brought by the appellants under section 283 of the old Code of Civil Procedure (Act XIV of 1882), to establish their right to attach and sell the property in dispute as that of their judgment debtors the 1st respondent and Dnyaneshwar (father of the 4th respondent), in execution of their money decree In such a suit the appellants must prove that on the date of the attachment, which was subsequently raised by order of the Court on the

application of the 1st respondent, their judgment-debtors had a subsisting right to the property *Harishankar Jebhai* v. *Naran Karsan*[1]. The suit must then be tried as if it were a suit for possession by the judgment debtors.

So regarded, it is not the case here of the judgment-debtors having been dispossessed or having discontinued possession while in possession of the property. The allegation, which has been found proved, is that when Namdeo, father of the judgment debtors, died, leaving them minors, his mistress Ambu looked after them by administering to their wants and entered into possession of their property.

The Subordinate Judge who tried the suit, held that Ambu's possession had been from the beginning wrongful and he negatived the plea of the appellants' father that she had commenced her *vahivat* on behalf of his judgment debtors, who had then been minors. The Subordinate Judge with appellate powers has recorded no finding on that plea. But the law is, as pointed out by Lord Hardwicke in *Morgan* v. *Morgan*[2] "where any person, whether a father or a stranger, enters upon the estate of an infant, and continues in possession, this Court will consider such person entering as a guardian to the infant" (see other decisions to the same effect collated in the notes to the case of *Taylor* v. *Horde*, Smiths' Leading Cases, Vol II, 10th Edn., pp 644 and 645). Ambu's possession must, therefore, be deemed to have begun as that of bailiff or agent for the minors and to have continued as such until, after the minors had arrived at the age of majority, she did something to convert it into a wrongful possession on her own account.

It was only in 1891 that she denied their title and in consequence she had to be sued. But there had never been any dispossession by Ambu of the appellants' judgment debtors while they had been in possession, because it was she who had been in possession. "Dispossession is where a person comes in and drives out the others from possession" (per Fry, J., in *Rains* v. *Buxton*[3]).

(1) (1893) 18 Bom 2[illegible].
(2) (1737) 1 Atk 489.
(3) (1880) 14 Ch D 537, [illegible].

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VASUDEO ATMARAM JOSHI v. EKNATH BALKRISHNA THITE

In a suit against her, her plea of limitation would be decided by the application, not of article 142, but of article 144 (*Lallubhai Bapubhai* v. *Mankuvarbai*[1], *Dadoba* v. *Krishna*[2])

On the fact alleged and found proved, Ambu herself was wrongfully dispossessed in 1898 by Vithal, under whom the 1st respondent claims. The appellants' judgment debtors do not claim under or through Ambu, rather they claim against and in spite of her, and it is found in the judgment under appeal that the respondents claiming under Vithal cannot tack on the period of their possession to Ambu's. That is not contested before us. So it cannot be said that the dispossession of Ambu by Vithal in 1898, when she was in possession of the property, was dispossession of the appellants' judgment debtors. Article 142 is out of place in this respect also.

So much for the dispossession required to bring the case under article 142. But the article also contemplates discontinuance of possession by the person suing. As was said by Fry, J. in *Rain* v. *Buxton*[3], "discontinuance is where the person goes out and is followed into possession by other persons." It implies that the person discontinuing has given up the land and left it to be possessed by anyone choosing to come in. In the present case there was, whether on the allegations in the pleadings or on the facts found, no such abandonment. It is not the case of any party and it is not the finding of the Courts below that the appellants' judgment-debtors, while in possession, relinquished it as if they did not care for it, and that in consequence the respondents followed *them* into possession.

The decree for possession obtained by the appellants' judgment-debtors (the 3rd respondent and Dnyaneshwar) against Ambu has no doubt become incapable of execution by reason of their failure to apply to the Court for its execution within the period prescribed by the law of limitation. But nevertheless the right established by it remains, and though that right cannot be enforced as against Ambu by execution through the Court, the decree holders can enter by ousting any trespasser, Ambu included. *Bandu* v. *Naba*[4].

(1) (1876) 2 Bom. 413.
(2) (1879) 7 Bom. 34.
(3) (1880) 14 Ch. D. 537, 539.
(4) (1890) 15 Bom. 238.

Under these circumstances, there being no allegation of possession in the appellants' judgment debtors lost by dispossession or discontinuance of possession, but the case put forward being a title in them established by their decree against Ambu and a wrongful possession obtained from her after the decree by Vithal, under whom the 1st and 2nd respondents claim, the limitation applicable to the suit is that provided by article 144, not article 142 of the statute, according to the ruling of this Court in *Fakir Abdulla v. Babaji Gungaji*[1], where the distinction between the two articles is explained The first two respondents admitted in their written statement the original title of Namdeo, from whom as heirs the appellants' judgment debtors derive their ownership, but they pleaded that the title had become extinct by reason of the alleged purchase by Vithal from Namdeo in 1878 and of Vithal's adverse possession for 12 years from that year The purchase being found not proved, the respondents in question can succeed only by proving their right by adverse possession for 12 years They have failed to prove it In this respect the case resembles in its pleadings *Gangabayal Nago Kaial Mhatra v Nagu Dhaya Mhatra and others*[2] There the plaintiff, who sued for possession on the strength of her title and defendants' tenancy under her was met by the defence that the defendants had obtained the land from her, first, under a certain agreement and afterwards under a mortgage, and that they had been in adverse possession for more than 12 years This Court held that, though the plaintiff had failed to prove the tenancy of the defendants set up by her, yet, as the defendants had admitted the plaintiff's title but alleged having come into possession under her the defendants "cannot claim to retain the land except by proving that they are entitled to do so in virtue of one or other of the alleged transactions with the plaintiff or that their possession has been in fact adverse for twelve years"

For these reasons the decree appealed from must be set aside and that of the Subordinate Judge with appellate powers restored, with the costs of the second appeal and this appeal

(1) (1890) 14 Bom 458 (2) (1887) P J 242

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Vasudeo Atmáram Joshi v Laxnath Balkrishna Thite

under the Letters Patent on the 1st and the 2nd respondent, who were respectively defendants 1 and 2 in the suit

HEATON, J —The facts are recited in the judgment of the learned Chief Justice from whose decision this is an appeal under the Letters Patent

The plaintiff's claim is to make good the ownership of defendants 3 and 4 over the land in suit It was opposed by defendants 1 and 2 who claimed independent ownership It was objected that the claim to establish the title of defendants 3 and 4 was barred by *article 142 of the Schedule to the* Indian Limitation Act But it seems to me that neither in form nor in substance is this claim of the kind contemplated by article 142 It is a claim by an owner for his land against a trespasser, and the cause of action is not based on dispossession or discontinuance of possession, but simply on the allegations that defendants 3 and 4 are the owners of the land and that defendants 1 and 2 have no right to be there. It is established that defendants 3 and 4 are the owners and that defendants 1 and 2 have *no right to be there It is also established that defendants* 1 and 2 first came into possession within 12 years of the institution of the suit and that there is no title made good by adverse possession against defendants 3 and 4 These defendants have the title and their title still subsisted when this suit was brought it had not been extinguished

I do not think that article 142 has any application to claims which neither in terms nor in substance are claims to possession, made necessary by reason of dispossession or discontinuance of possession It was indeed urged that it is a general principle that anyone suing in ejectment must prove possession within twelve years and the authorities seem to bear out that contention but the reason for this is that possession is commonly the effective assertion of title which is relied on and the cases accordingly deal with that particular kind of assertion of title But it is not the only one, there is another which in some cases is equally good, and that is an assertion of title made in Court and established by a decree That is good against those who

are party defendants to the suit and if the same title is reasserted and made good, as here in a later suit against other opposing parties, it is good against them also and entitles to possession whether the title claimant has or has not been in possession within twelve years, unless the opponent can defeat the title by adverse possession There is no such defeat in this case

Therefore I am of opinion that the appeal must succeed

Appeal allowed

APPELLATE CIVIL

Before Sir Basil Scott, Kt, Chief Justice and Mr Justice Batchelor

DAGDU VALAD SADU (ORIGINAL DEFENDANT) APPELLANT, v NANA VALAD SALU (ORIGINAL PLAINTIFF), RESPONDENT *

Evidence Act (I of 1872) section 92 proviso 1—Sale deed—Contemporaneous agreement—Admissibility—Fraud

A desired to set aside an ostensible sale deed by proving that a representation, agreement or promise was made to him at the time of execution that the deed would not be enforced as a sale deed

Held no evidence of such a representation agreement or promise could be admitted for this purpose

Dattoo v Ramchandra(1) and *Keshavrao v Raya*(2) followed

SECOND appeal from the decision of B C Kennedy, District Judge of Nasik, confirming the decree of B K Bal, Subordinate Judge of Sinnar

The properties in suit originally belonged to one Dagdu Lakshman Sonavar They were put up to auction sale in execution of a decree against him and were purchased by the plaintiff who sold them to the defendant on the 25th September 1...

In the year 1907 the plaintiff brought the present suit for a declaration that the sale deed passed by him to the ...

* Second Appeal No 797 of 1909

(1) (1905) 30 Bom 119 (2) (1906) 8 Bom L R ...

B 1772—1

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DAGDU VALAD BADU v. NANA VALAD SALU

was in reality a mortgage and for the redemption of the properties under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879)

The defendant contended that the properties belonged to him and not to the plaintiff that the plaintiff knowingly passed the sale deed without any deception on the defendant's part, and that at the auction sale the property was purchased by the plaintiff for and on behalf of the defendant

The Subordinate Judge raised six issues in all, and out of them issues Nos 1 and 2 were as follows —

1 Whether plaintiff proves any invalidating circumstances such as fraud, misrepresentations, &c which would entitle him to prove that the apparent nature of the deed and of the transaction is not the real one and that the transaction was in reality a mortgage and that he meant to execute a mortgage deed only?

2 If so whether the transaction is in reality a mortgage? Whether plaintiff intended to and did execute a mortgage deed only as the plaint alleges? Or whether plaintiff had really purchased the property benami for the defendant as he contends?

The findings on the said issues were in the affirmative with the following addition to the finding on issue No 2 —"Plaintiff knowingly executed a sale deed, only in form however" On the said findings the Subordinate Judge made a declaration that the transaction was a mortgage, and ordered redemption under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879)

On appeal, the first out of the two issues raised was —

Did the defendant at the time of the execution of the sale deed represent to the plaintiff that the sale deed would not be enforced as such but that the sale price would be treated as a loan or mortgage?

The District Judge found on the said issue in the affirmative and confirmed the decree

R R Desai for the appellant (defendant) —

The plaintiff did not set up a contract of re-sale and did not sue on that ground He alleged that the transaction in suit, though in the form of a sale, was in reality a mortgage The lower Courts allowed evidence in support of the plaintiff's

contention that there was a contemporaneous agreement to treat the sale as a mortgage Such evidence was not admissible *Balkishen Das* v *W F Legge*[1], *Dattoo* v *Ramchandra*[2], *Keshavrao* v *Raya*[3]

G K Dandekar for the respondent (plaintiff) —

The cases relied on have no application The present case falls under proviso I of section 92 of the Evidence Act Fraud was alleged on the part of the defendant, and it was proved *Navalbai* v *Sitabai*[4], *Krishnabai* v *Pama*[5], *Sangira* v *Ramappa*[6] Both the lower Courts have found as a fact that there was promise by the defendant that the transaction would be treated as a mortgage Under section 17 (3) of the Contract Act a promise made without any intention of fulfilling it is a fraud Thus we were entitled to lead evidence to prove fraud on the part of the defendant A party's intention at the time of the contract can be gathered from his subsequent conduct On this point no specific issue was raised in the lower Courts, therefore an issue may be sent down

SCOTT, C J —The learned Judge, for the reasons stated in the Appendix to his judgment, is of opinion that a person who wishes to set aside an ostensible sale deed can do so on proving that a representation was made to him at the time of execution that it would not be enforced as a sale deed, and he accordingly states as the first question which arises for decision in the appeal before him —"Did the defendant at the time of the execution of the sale-deed represent to the plaintiff that the sale deed would not be enforced as such?" In other words, did the defendant promise to the plaintiff that the sale deed would not be enforced as such? Stated in this form the question propounded by the learned Judge is whether or not there was a contemporaneous agreement between the parties inconsistent with the written document executed by them

We think it is clear upon the authorities binding upon us that no evidence of such an agreement or promise or representation

(1) (1899) 22 All 149
(2) (1905) 30 Bom 119
(3) (1906) 8 Bom L R 287
(4) (190) 8 Bom L R 761
(5) (1906) 8 Bom L R 7[illegible]
(6) (1909) 34 Bom 59

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can be admitted The Court's view of the law expressed in *Balkishen Das* v *W F Legge*[1] was acted upon in *Dalloo* v *Ramchandra*[2] and again in *Keshavrao* v *Raya*[3] and in *Achuta ramaraju* v *Subbaraju*[4]

Mr Justice Batty in *Keshavrao* v *Raya*[3] said " the fraud which under proviso I, section 92, may be proved, must be fraud which would invalidate a document, and therefore subsequent fraud in respect of the document not such as to invalidate it could not be a ground for admitting extraneous oral evidence under proviso I of section 92 The real effect of admitting such evidence would not be to prove fraud in the execution of the document, but the existence of a different intention than that which appears on the document itself In other words, it would be an attempt to prove a different contract from that expressed in the document without proving any fraud in the preparation of the document which would invalidate it "

The learned pleader for the respondent in order to escape from this decision has contended that the representation or promise which the learned District Judge held in this case to be proved amounted to fraud as defined by section 17 (3) of the Contract Act where it is said that fraud means and includes a promise made without any intention of performing it

There is in this case, however, no finding that the defendant at the time of making the promise had no intention of performing it He may have made the promise in good faith and changed his mind afterwards when he found the value of the property in dispute had increased and that it was more advantageous for him to rely upon the sale evidenced by the written document than upon the mortgage which, the plaintiff alleges, was the real agreement between the parties

We hold that the document executed by the plaintiff must be treated, as it appears on its face to be, as a sale-deed and not as a mortgage

(1) (1899) 22 All 149
(2) (1905) 30 Bom 119
(3) (1906) 8 Bom. L. R 287
(4) (1901) 25 Mad. 7

We, therefore, reverse the decree of the lower Court and dismiss the suit with costs throughout on the plaintiff

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DADDU VALAD SADU v. NANA VALAD SALU

Decree reversed and suit dismissed

G B R.

APPELLATE CIVIL

Before Sir Basil Scott, Kt, Chief Justice and Mr Justice Batchelor

THE TALUKDARI SETTLEMENT OFFICER (ORIGINAL PETITIONER) APPELLANT v CHHAGANLAL DWARKADAS (ORIGINAL OPPONENT), RESPONDENT *

1910
July 28.

Gujerath Talukdars Act (Bom. Act VI of 1888) section 31(1)*—Land Revenue Code (Bom Act V of 1879)—Talukdari tenure—Wanta lands (at Sarsa)—Alienated land—Attachment of income*

Wanta lands are lands held by Rajputs or the representatives of Rajputs who after the Mahomedan conquest of Gujerath, received one-fourth of the land of certain villages on condition of keeping order in those villages The lands were held either rent free or at a small quit rent

* First Appeal No 187 of 1909

(1) Section 31 of the Gujerath Talukdars' Act (Bom Act VI of 1888) as amended by Bombay Act II of 1905 is as follows —

31 (1) No incumbrance on a Talukdar's estate or on any portion thereof made by the Talukdar after this Act comes into force shall be valid as to any time beyond such Talukdar's natural life unless such incumbrance is made with the previous written consent of the Talukdari Settlement Officer or of some other officer appointed by the Governor in Council in this behalf and after the death of a Talukdar no proceeding for the attachment sale or delivery of, or any other process affecting the possession or ownership of a Talukdari estate or any portion thereof in execution of any decree obtained against such Talukdar or his legal representative, except a decree obtained in respect of an incumbrance made with such consent as aforesaid or made before this Act comes into force shall be instituted or continued except with the like consent.

(2) No alienation of a Talukdar's estate or any portion thereof or of any share or interest therein made after this Act comes into force shall be valid unless such alienation is made with the previous sanction of the Governor in Council which sanction shall not be given except upon the condition that the entire responsibility for the portion of the jama and of the village expenses and police charges due in respect of the alienated area, shall thenceforward vest in the alienee and not in the Talukdar

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THE TALUKDARI SETTLEMENT OFFICER v. CHHAGANLAL DWARKADAS

Where *Sarsa Wanta* land the income of which is attached in execution of a decree is proved to have been entered as alienated land under the Land Revenue Code (Bom Act V of 1879) the Court may presume that it is not land held upon Talukdari tenure in the strict sense of the word

The words ' Talukdar s estate in section 31 of the Gujerath Talukdars Act (Bom Act VI of 1888) are used in a technical sense limited to the Talukdar s interest in the estate held by him by reason of his status as a Talukdar

Khodabhai v *Chaganlal*[1] and *Bhachubha* v *Vela Dhanji*[2] followed

FIRST appeal from the decision of G V Saraiya, First Cl ss Subordinate Judge of Ahmedabad, in miscellaneous application No 51 of 1908

One Chhaganlal Dwarkadas obtained a decree, No 60 of 1899, in the Court of the First Class Subordinate Judge of Ahmedabad, against Takhatsingji Ramsingji, the Thakore of Kherda The defendant died on the 7th August and the decree was passed on the 8th August 1899 At the time of his death the defendant was entitled to revenues from three sources namely, (1) Toda Giras allowance of Rs 1,100 per annum, (2) the income of two Talukdari villages of Kherda and Rajpura, and (3) the income of certain *Wanta* lands in seven Government villages of Wasad, Anklavdi, Vera, Sarsa, Khanpur, Vaghasri and Adas On the defendant's death, the whole of his estate was attached by Government officers under section 144 of the Land Revenue Code (Bom Act V of 1879) and the Talukdari Settlement Officer claimed to have been in possession of the estate from that date The plaintiff Chhaganlal applied for the execution of the said decree and a sum of Rs 8,516, standing in the books of the Kacheri of the Mamlatdar of Anand to the credit of the estate of the defendant Thakore, was attached on the 19th June 1905, and subsequently on the 13th November 1907 another sum of Rs 5,200 standing to the credit of the same estate was similarly attached

The Talukdari Settlement Officer, thereupon, applied to the Court on the 9th July 1908 for the release of the said amounts from attachment on the grounds that they were not liable to be attached under section 5 of the Toda Giras Allowances Act

(1) (1907) 9 Bom L R 1152. (2) (1909) 34 Bom 53

(Bom Act VII of 1887) and that the income of the estate of the Talukdar was not liable to the decretal debt after his death

The plaintiff opponent contended that the attached sums did not form parts of the collections made by the Talukdari Settlement Officer on account of Toda Giras Hak Allowances, that they formed part of the collections made by the said officer on account of the profits of *Wanta* lands at Sarsa, therefore, he was entitled to attach them and that the proper person to apply for the removal of attachment was the heir of the deceased judgment debtor and not the Talukdari Settlement Officer

The Subordinate Judge found that the Talukdari Settlement Officer could maintain the application under section 47 of the Civil Procedure Code (Act V of 1908), that the lands of the said seven villages which belonged to the deceased Talukdar did not form part of the Talukdari estate so as to attract the application of section 31 of the Talukdars Act (Bom Act VI of 1888) as amended by Bombay Act II of 1905, that out of the two sums attached, Rs 3,301 6 6 was the amount of income of lands other than the property consisting of Toda Giras Hak and the Talukdari villages of Kherda and Rajpura, that the decree-holder was not entitled to attach the income of Toda Giras Hak and the Talukdari villages of Kherda and Rajpura and that Rs 8 236 6 0 and Rs 1,895 9 6 should be released from attachment

The Subordinate Judge, therefore, passed the following order —

I order that Rs 8 236 9 0 do be released from attachment I also order that Rs 1 895 9 6 being the difference between Rs 5 200 and Rs 3 301-6 6 do be released from attachment A letter to be written to the Talukdari Settlement Officer requesting him to send Rs 3,301 6 6 being the amount which is held to be liable for the decretal debt

The applicant (the Talukdari Settlement Officer) preferred an appeal

R W Desai for the appellant (applicant)

T R Desai for the opponent (judgment creditor), was not called upon

SCOTT, C J —On the 8th of August 1899 a decree was passed at a suit of the opponent Chhaganlal against the Thakore of

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THE TALUKDARI SETTLEMENT OFFICER v. CHHAGANLAL DWARKADAS

Kherda in Suit No 60 of 1899 in the Court of the First Class Subordinate Judge of Ahmedabad

The defendant had died the day previous to the decree At the time of his death he was entitled to revenues from three sources Toda Giras allowance of Rs 1,400 per annum, the income of two Talukdari villages, and the income of certain *Wanta* lands in seven different Government villages

On the 20th of August 1899 the whole of the estate of the deceased defendant was taken under attachment by Government officers purporting to act under section 144 of Bombay Act V of 1879, and the Talukdari Settlement Officer who is the appellant in this case claims to have been in possession of the estate from that date

On the 19th of June 1905 a sum of Rs 8,516, standing in the books of the Government Kacheri of Anand to the credit of the estate of the Thakore, was attached by the judgment creditor, and on the 13th November 1907 another sum of Rs 5,200, standing to the credit of the estate of the Thakore, was similarly attached

The Talukdari Settlement Officer instituted these proceedings in 1908 applying that the attached sums should be released from attachment

In the lower Court a question arose as to the origin of the two sums attached, and upon issues being raised it was held that the sums of Rs 8,236 9-0 and Rs 1,895 9 6 forming part of the sum of Rs 5,200, were the produce of property not liable to attachment, but that Rs 3 304-6 6 was income derived from lands other than property consisting of Toda Giras Hak and Talukdari villages and was therefore liable to attachment

An appeal has been preferred by the Talukdari Settlement Officer and a preliminary point was taken on behalf of the opponent that no appeal would lie as the Talukdari Settlement Officer was not representative of the judgment debtor within the meaning of the Civil Procedure Code

We thought it advisable, however, not to decide the preliminary point but to hear arguments upon the appeal on its merits

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THE TALUKDARI SETTLEMENT OFFICER v. CHHAGANLAL DWARKADAS.

We have now heard Mr Ramdatt Desai who has argued the case very fully on behalf of the Talukdari Settlement Officer, and we are of opinion that the decision of the lower Court was right

It has been proved that the lands from which the sum of Rs 3,804 6 6 was derived were *Wanta* lands

There is no question as to the nature of *Wanta* lands That is made clear by Robertson's and Wilson's Glossaries, by the Ras Mala and by the Judgment of Sir Michael Westropp in *Dolsang Bhaisang* v *The Collector of Kaira*[1] They are lands held by Rajputs or the representatives of Rajputs who, after the Mahomedan conquest of Gujerath, received one fourth of the land of certain villages on condition of keeping order in those villages The lands are held either rent free or at a small quit rent

The first point taken in appeal is that these *Wanta* lands are part of the 'Talukdari Estate' in the strict sense of that expression and that consequently the attachment of the income derived from these lands cannot continue in face of the provisions of section 31 of the Gujerath Talukdars' Act as amended by Bombay Act II of 1905

The Head Clerk to the Talukdari Settlement Officer gave evidence in the case and was cross examined as to the nature of Talukdari tenure and as to whether the *Wanta* lands in question were held on Talukdari tenure His evidence is as follows —

'To my knowledge summary settlement is paid for the *Sarsa Wanta* land There is some difference between the Talukdari estate and the Talukdar's estate Talukdar's estate means estate of whatever tenure, that is if a Talukdar holds some Government lands they are also called Talukdar's estate The Talukdari estate means estate with full proprietary right held by Talukdar under what is called Talukdari tenure There is no definition given of the Talukdari tenure in any enactment I cannot give a definition of the Talukdari tenure but I can give illustration of it The Land Revenue Code recognizes two kinds of land, alienated and unalienated The Talukdari does not come under either of these categories because it is of full proprietary right and its origin antedated the British rule The said two are the chief distinguishing characteristics of the Talukdari tenure

It is proved in this case that the *Sarsa Wanta* land from which the attached sum is derived is entered as alienated land under

(1) (1879) 4 Bom 367.

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The Talukdari Settlement Officer v Chhaganlal Dwarkadas

the Land Revenue Code We may therefore assume that it is not Land held upon Talukdari tenure in the strict sense of the word That is sufficient, we think, to dispose of the first part of Mr Ramdatt Desai's argument

Mr Ramdatt Desai's second point was that 'Talukdari Estate' in the section to which we have referred and generally throughout the Talukdars' Act is not to be interpreted as limited to estate held on Talukdari tenure but means the whole of the property of a person who answers to the description of a Talukdar, whether held by him by reason of his status as Talukdar, or otherwise

In dealing with this argument we will assume (without deciding) that income derived from an estate is portion of the estate within the meaning of section 31

We have the authority of two judgments of this Court to the effect that the words "Talukdar's estate" in section 31 are used in a technical sense limited to the Talukdar's interest in the estate held by him by reason of his status as a Talukdar see *Khodabhai* v *Chaganlal*[1] and *Bhachubha* v *Vela Dhanji*[2] We are bound by the decision in each of these cases

We have, however, permitted full argument from Mr Ramdatt Desai based upon the various enactments relating to Talukdars and the different sections of the Gujerath Talukdars Act, and we entirely agree with the conclusion arrived at in those cases

For these reasons we affirm the decision of the lower Court and dismiss the appeal with costs

Decree affirmed

G B R

(1) (1907) 9 Bom L. R. 112[illegible] (2) (1909) [illegible] B [illegible]

ORIGINAL CIVIL

Before Sir Basil Scott, Kt, Chief Justice, and Mr Justice Batchelor

JEEWANDAS DHANJI APPELLANT AND DEFENDANT, v RANCHODDAS CHATURBHUJ, RESPONDENT AND PLAINTIFF * 1910 *August 5*

Execution proceedings—Decree in Baroda Court—Transmission to Bombay High Court for execution—Application to execute—Limitation—Civil Procedure Code (Act V of 1908) section 48, and Schedule I, Order XXI

On 17th July 1893 the plaintiff obtained a decree in the Amreli Court in the territory of H H the Gáekwár of Baroda On 12th May 1894 an application for execution was made On 10th July 1905 a second application was made the prayer being for the attachment of the moveable properties of the defendant in whatsoever villages and at whatsoever places in Okhamandal" Okhamandal being within the jurisdiction of the Amreli Court the order for attachment was made

On 5th July 1909 the decree was transmitted on the plaintiff's application to the Bombay High Court for execution and on 15th October 1909 an application for execution by attachment of property in Bombay was made

Held, that the application was a substantive application with regard to the property in Bombay which was not the subject of any previous application and being made more than 12 years after the date of the decree, was barred by the provisions of section 48 of the Civil Procedure Code (Act V of 1908)

An order by a Court passing a decree for the transmission of a decree for execution to another Court is not an order for the execution of the decree, nor is an application for the transmission an application for execution

Husein Ahmad Kaka v *Saju Mahamad Sahid*(1) distinguished

PROCEEDINGS in execution

On 17th July 1893 the plaintiff abovenamed obtained a decree for Rs 6,727 and costs against Jeewandas Dhanji and another in the Amreli Court, in the territory of H H the Gáekwár of Baroda On 12th May 1894, the first application to execute the decree was made This application was finally disposed of on 12th August 1898 Subsequently the plaintiff heard that the defendants were coming on business to Okhamandal

* Appeal No 46 of 1909, Original Suit No 562 of 1889 90 in District Court at Amreli (Baroda)

(1) (1890) 15 Bom 28

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JEEWANDAS DHANJI v. RANCHODDAS NATUBHUJ

(within the jurisdiction of the Amreli Court) and he, therefore on 10th July 1905, made a second application for execution, a rough translation of the material part of the prayer being as follows —

As to whatever moveable properties I may point out for taking under attachment in whatsoever villages and at whatsoever places in Okhamandal the same may be attached and sold by auction, and the moneys derived therefrom may be paid to me "

He further asked for the arrest and detention of the defendants On 25th July 1905 an order was made for the attachment of the moveable properties as prayed, and a notice was issued against the defendants to show cause why they should not be arrested This notice was ultimately discharged on 30th July 1908

On 29th September 1908 the plaintiff applied to the Amreli Court for transmission of the decree for execution to the Bombay High Court, under Government Notification No 2681, dated 3rd July 1908 (1)

The Amreli Court rejected the application, but the rejection was set aside by the Appeal Court of Baroda and on 17th June 1909 the District Judge of Amreli made the following order —

'At the request of the applicant a formal certificate to issue *re* the execution of the decree (of this Court) by the High Court of Bombay according to section 218 of the Civil Code Whether the Darkhast to be proceeded with here or not will be duly considered hereafter and decided accordingly "

In compliance with the above order, the District Judge on 5th July 1909 forwarded to the High Court at Bombay a copy of the decree, and a certificate setting forth what part of the decree remained to be executed On 14th September he forwarded in addition copies of the order of 25th July 1905 (granting the application for the execution of the decree) and the order of 17th June 1909

(1) In exercise of the powers conferred by section 229-B of the Code of Civil Procedure (Act XIV of 1882) the Governor General in Council is pleased to declare that the decrees of the Civil Courts situate in the territories of His Highness the Gáekwár of Baroda, which have not been established or continued by the authority of the Governor General in Council, may be executed in British India as if they had been made by the Courts of British India.

The plaintiff accordingly on 15th October 1909 applied to the Prothonotary for execution of his decree "by attachment and sale of the moveable property of the said Jeewandas Dhanji consisting of the stock in trade and goods lying in the shop of the said Jeewandas Dhanji situate in Chikal gully in the Mulji Jetha Cloth Market and bearing No 92"

The goods were attached, whereupon Jeewandas took out a summons against the plaintiff to show cause why the execution proceedings should not be quashed

On the applicant's depositing Rs 8,600 with the Prothonotary as security, the attachment on the goods was removed

Macleod, J, however, discharged the summons with costs, holding (1) that the order for transmission was an order on a previous application for execution, and therefore no notice was necessary to be issued under Order XXI, rule 2, and (2) that the plaintiff's application to the Bombay High Court for the attachment of the goods was not a fresh application and was therefore not barred under section 48 of the Civil Procedure Code (Act V of 1908)

The defendant appealed

Jayakar, with *Mulla*, for the appellant

Jinnah, with *Jardine* (acting Advocate General) and *Desai*, for the respondent

SCOTT, C J —This is an appeal from an order of Macleod, J, made in Chambers, dismissing an application by the second defendant to quash certain execution proceedings which had been taken against him in the Bombay High Court

The plaintiff had obtained a decree in the Amreli Court in the Baroda State on the 17th July 1898 He had presented certain applications for execution to the Amreli Court, of which the second was presented on the 10th July 1905, within twelve years of the passing of the decree In that application he prayed as follows —

"I pray for recovery of the amount of Rs 7637 4 10 from the defendants in accordance with the claim as shown in the application for execution The same is as follow —(1) On account of some urgent cause and occasion the defendants are now going to come specially to Okhamandal Therefore, at that time as to whatever moveable properties I may point out for taking

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under attachment in whatsoever villages and at whatsoever places in Okhamandal the same may be attached and sold by auction and the moneys derived therefrom may be paid to me (2) If the defendants moveable property be insufficient to satisfy the moneys then you would be pleased to cause the moneys to be recovered and given to me by enforcing for that purpose an order for imprisonment against the defendants The defendants are absconding to a foreign territory They have now no property at all within the jurisdiction of this Court Therefore simultaneously with enforcing execution as against moveable property you will also compel them to appear before this Honourable Nyayadhishi Court"

On the 25th of July 1905 an order was made by the Amreli Court to the effect that—

"The Darkhast (application for execution) after having been registered in the register book an order for execution should be issued for attaching the defendants moveable property The other prayer is for arrest and imprisonment of the defendants As to that matter along with the order dealing with the case of non satisfaction of moneys from moveable property a notice should be issued against the defendants calling upon them to show cause why an order should not be issued for their arrest and imprisonment"

Upon that notice a subsequent order was made on the 30th July 1908 declining to issue execution against the defendants personally

The plaintiff then applied to the Amreli Court for an order transmitting the decree for execution to the High Court of Bombay That application was refused on the 17th October 1908

An appeal was preferred to the appellate Court sitting in Baroda, upon which an order was made setting aside the order of refusal of the Amreli Court

The judgment of the Baroda Court is important The Judges say —

We hold that when the decree was such as could be executed, the lower Court should not have objected to granting the appellant s application Had the Darkhast of the appellant been presented on the 15th July 1906 instead of on the 15th July 1905 after the date of the decree then it could have been held that the decree was no longer such as could be executed Such is not, however, the case in the present proceedings. Hence the appellant s decree was not time-barred but was within time We, therefore decide that the application made by the appellant for a certificate for the execution of the

decree in the Bombay High Court deserves to be granted. When the decree is sent to the Bombay High Court for execution that Court will see whether the decree can be executed according to their law of limitation But that point has not been considered here It seems that the question is a difficult one But according to our law the decree is such as can be executed."

In an earlier part of the judgment upon the question whether the lower Court was right in deciding that the application having been made after twelve years the decree became time barred and could no longer be executed, the learned Judges hold that —

"Properly speaking the application was not a Darkhast but an application What particulars there ought to be in a Darkhast for execution of a decree is stated in the Civil Procedure Code section 223 As the said particulars are not stated in this application the same does not become a Darkhast But it is an application made according to Civil Procedure Code, section 217 Such an application for the transfer of a decree is a step in aid of the execution of the decree within the meaning of clause 4, Article 179 Schedule II of Act XV of 1877 The British High Courts have held as above'

Mr Justice Macleod having an incorrect translation of the plaintiff's application for execution dated the 10th July 1905, was under the impression that the application was for attachment of "whatever moveable property the defendants might have at Okhamandal or any other place whatever" That, however, was not the application The words were "in whatsoever villages and at whatsoever places in Okhamandal the same may be attached' Okhamandal being within the jurisdiction of the Amreli Court, the application for execution was in order in so far as it related to moveable property in Okhamandal Mr Justice Macleod being of opinion that there was an order for execution based upon an application for execution of moveable property of the defendants wherever situate, held that he was bound by the order of the Amreli Court for execution against the moveable property mentioned in the application of the 10th July 1905 and that therefore the attachment against the property of the defendant in the Mulji Jetha Market in Bombay which was more particularly specified in an application to the Prothonotary after the decree had been transmitted from Baroda to Bombay for execution, was a good attachment

In coming to that conclusion he felt himself to be bound by the decision of this Court in *Husein Ahmad Kaka v. Saju Mahamad*

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Sahid[1] That was a case in which after a decree had been obtained against a judgment debtor in the Court of Small Causes at Rangoon in 1883 and after the judgment debtor who had been arrested in execution had died in gaol in December 1883, an application was made to the Rangoon Court in November 1886, under section 248 of the Civil Procedure Code, for the execution of the decree against the judgment debtor's legal representative. The Rangoon Court in February 1887 ordered that the decree should be executed and it was thereafter transferred for execution to the Court of the First Class Subordinate Judge at Surat, and a Darkhast for execution was presented in that Court on the 22nd April 1887 against property in Surat. It was objected by the defendants on the record that the decree was barred by limitation. The Subordinate Judge overruled the objection and ordered execution to issue, being of opinion that the plea of limitation could not then be raised. The District Judge, on the other hand, considered himself competent to enquire into the propriety of the order for execution made by the Rangoon Court in February 1887. It was however, held by this Court on appeal that the District Judge had no power to determine whether the execution was barred in February 1887 or not, for an order for execution, though it may be erroneously made, is nevertheless valid unless reversed in appeal.

In our opinion, the case of *Husein Ahmad Kola* v. *Saju Mahamad Sahid*[1] has no application here. The order for transmission by the Baroda Court is not an order for execution, nor is the application for transmission by the Baroda Court to the Bombay Court an application for execution, and we are of opinion that the objection taken on behalf of the judgment debtor is good, namely, that the present application against the property of the judgment debtor in the Mulji Jetha Market in Bombay is barred by the provisions of section 48 of the Civil Procedure Code. That section provides that where an application to execute a decree, not being a decree granting an injunction, has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from the date of the

(1) (1891) 16 Bom. 28

decree sought to be executed Here, we have an application made to the Prothonotary of this Court in Bombay after the transmission by the Baroda Court of the decree and that application is a substantive application with regard to the property in Bombay which was not the subject of any previous application It is an application made in accordance with the provisions of Order XXI, rule 11

There is ample authority for the proposition that an order by a Court passing a decree for the transmission of a decree for execution to another Court is not an order for the execution of the decree, nor is an application for the transmission an application for execution *Nilmony Singh Deo v Biressur Banerjee*[1], *Suja Hossein v Monohur Das*[2] The whole of the argument on behalf of the plaintiff upon this point has been devoted to the attempt to satisfy this Court that the order for transmission is an order for execution It is, however, clear from the records of the Baroda Court itself that the application for transmission was treated as an application for transmission and nothing more, and that the order which was made for transmission was not treated as an order for execution but as an order for transmission *re* the execution of the plaintiff's decree

Here, therefore, we are concerned with a fresh application made more than twelve years after the date of the decree, and it is clear from the provisions of section 48 of the Civil Procedure Code that it cannot be entertained

We, therefore, reverse the decision of the lower Court and make the defendant's summons absolute with costs throughout

The amount withdrawn must be refunded

The order for costs will include poundage expenses

Decree reversed

Attorneys for the appellant Messrs *Malvi, Hiralal, Mody and Ranchoddas*

Attorneys for the respondent Messrs *Dikshit, Dhanjisha and Soonderdas*

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(1) (1889) 16 Cal 744 (2) (1895) 22 Cal 921

ORIGINAL CIVIL

Before Mr Justice Davar

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February 22

TREACHER & Co, LTD, PLAINTIFFS v MAHOMEDALLY ADAMJI PEERBHOY, DEFENDANT *

Sale of immoveable property—Marketable title to the satisfaction of the purchaser s solicitors—Specific performance

When a vendor of immoveable property desires to enforce a contract for sale with a condition that the title adduced should be to the satisfaction of the purchaser s solicitors, he must prove either that the solicitors did approve of the title or that there was such a title tendered as made it unreasonable not to approve of it

Clack v *Wood*[1] followed

THIS was a suit for the specific performance of a contract for the purchase and sale of immoveable property situate in Byculla By the contract, which was contained in correspondence that passed between the parties towards the end of the year 1907, the plaintiff Company agreed to sell and the defendant to purchase the property for the sum of Rs 2,50,000 on certain conditions which were subsequently slightly modified One of the terms, which was retained without modification, was that the vendors should deduce a marketable title to the satisfaction of the purchaser's solicitors

In pursuance of the contract the defendant paid to the plaintiff Company a sum of Rs 50,000 by way of earnest-money, and later, in consideration of a postponement of completion, a further sum of Rs 50,000 towards the purchase money When, however, the defendant s solicitors came to investigate the title deeds to the property and received answers to certain requisitions put by them to the plaintiffs, they contended that the title was not satisfactory in accordance with the terms of the contract, and, eventually, by a letter of 7th April 1909, purported finally to rescind the contract

* Suit No 127 of 1909
(1) 1882) 9 Q B D 276

The plaintiffs therefore filed this suit to enforce the contract The defendant in his written statement counterclaimed for a return, with interest, of the Rs 1,00,000 already paid by him to the plaintiffs, and for a further sum by way of damages

The chief points at issue and the arguments of counsel are clearly set forth by the learned Judge in his judgment

Inverarity, with *Robertson* and *Chamier*, appeared for the plaintiffs

Lowndes, with *Strangman* Advocate General, and *Jardine*, appeared for the defendant

DAVAR, J —The plaintiffs in this suit are a limited liability Company which was incorporated in the early sixties They acquired the business and the properties of certain individuals, who were, previous to the formation of this Company, carrying on business in Bombay in the name of Treacher & Co The plaintiffs since their incorporation have continued to carry on their business in Bombay in the name of Treacher & Co, Ltd Amongst the properties acquired by the Company, were certain lands and buildings thereon situated at Byculla at the corner of Duncan and Bellasis Junction roads The property was conveyed to the plaintiff Company soon after its formation and the Company has been in occupation and possession of the lands and building thereon ever since It appears that the Company were desirous of selling their Byculla property and they attempted to sell the same by public auction on the 18th of November 1907 As however there was no attendance of bidders, the property was not put up for sale The defendant, who is a merchant and one of the sons of a well known citizen of Bombay, Sir Adamji Peerbhoy, hearing of the desire of the plaintiffs to sell their property, opened negotiations with Mr Knowles the General Manager of the plaintiff Company, with a view to purchase this property The negotiations culminated in a letter which the defendant addressed to the plaintiff Company on the 28th of November 1907 In that letter the defendant offered to purchase the Byculla property for a sum of Rs 2,50,000, on certain terms and conditions mentioned by him therein The principal terms with which we

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are concerned in this case are, first, that a portion of the plaintiffs' land which was Sanadi land should be converted by the plaintiffs and sold by them "as of quit and ground rent tenure free from all claims of Government or Municipality but subject to the payment of quit and ground rent and Municipal taxes as from the date on which the sale is completed," and secondly, that the plaintiffs were "to deduce a marketable title to the premises to the satisfaction of the purchaser's solicitors" In this offer the defendant gave the plaintiffs option to complete the sale within three months or ten months from the date of the acceptance of his offer After certain correspondence had taken place between the parties, the defendant's offer was eventually accepted by the plaintiffs The defendant paid Rs 50,000 by way of earnest money and it was arranged that the sale should be completed at the end of ten months Under this arrangement the defendant would have had to pay the balance of the purchase money and complete the sale by the end of September 1908 The plaintiffs were ready and willing to complete the sale in September The defendant, however, seems to have been in some difficulty about completing the sale at the end of September By their letter of the 31st of August 1908 the plaintiffs intimated to the defendant that they were ready to complete at the end of September On the 9th of September the defendant, addressing the plaintiffs' General Manager Mr Knowles, says —

"You will recollect that the writer had mentioned to you that the completion of the sale of the property should be allowed to stand over for about eight months from the 1st instant the purchasers in the meantime paying interest on the balance of the purchase money at 5 per cent and all taxes and insurance

He asks Mr Knowles to place this proposal before the directors and to request them to accept the same On the 12th of September the plaintiffs acceded to the defendant's request to postpone completion of the same on certain terms which are set out in their Manager's letter to the defendant of that date After some further correspondence, it was eventually agreed between the parties that the completion should be put off for eight months on certain terms, one of which was that the defendant

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was to pay to the plaintiffs a further sum of Rs 50,000 towards the purchase money The defendant accepted the plaintiffs' terms and ultimately on the 11th of November 1908 he paid in a further sum of Rs 50,000 and the completion was postponed for eight months It is not quite clear whether the eight months were to be calculated from the 1st of September or the 1st of October The plaintiffs in their letter of the 12th of September say

'The Board are prepared to allow you to defer the same (meaning completion of purchase) for eight months from the 1st instant

In their letter of the 11th of November, their General Manager says —

I note that the balance of a lac and fifty thousand will be paid within eight months from the 1st of October last according to the conditions laid down in my letter of the 12th of September last

There is thus a small contradiction in the correspondence as to the date of completion According to the terms as originally proposed by the plaintiffs and accepted by the defendant, the time for completion was extended for eight months from the 1st of September which would be the end of April Possibly the plaintiffs' Manager was in error when in his letter of the 11th of November he talked of eight months from the 1st of October For the purposes of this case, however, this small contradiction is of no importance, and I will assume that the contract between the parties was that the sale should be completed eight months from the 1st of September, that is, by the end of April 1909 One of the terms imposed by the plaintiffs in their letter of the 12th of September 1908 was that the defendant was to sign an agreement drawn up by their solicitors in which the terms mentioned in the letter together with those already settled between them should be embodied In the course of correspondence in connection with that agreement, the defendant's solicitors, on the 12th of November 1908 asked the plaintiffs' solicitors to send them the title deeds relating to the property to enable them to investigate the title Such title-deeds as the plaintiffs had, were sent to the defendant's solicitors and the defendant's solicitors instituted a search in the Collector's office,

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the result of which is embodied in certain notes and a report of their clerk which collectively form Exhibit A-37 On the 26th of January 1909, the defendant's solicitors sent certain requisitions on title of the plaintiffs to the property contracted to be sold by them, and in the letter which accompanied the requisitions they say —

'Until the requisitions are satisfactorily answered and objections removed, we are unable to advise our client to accept the title and to sign the proposed agreement

The plaintiffs' solicitors answer the requisitions but refuse to answer some of them After the requisitions were answered, the defendant's solicitors on the 8th of February 1909 write and say that the plaintiffs had not made out a marketable title to the property to their satisfaction in accordance with the terms of the contract and that the answers to the defendant's requisitions were not at all satisfactory They intimate that their client declines to execute the agreement and they demand repayment of the one lac of rupees paid to the plaintiffs, adding that if the money was not immediately returned, their client would claim interest at the rate of 9 per cent The plaintiffs' solicitors on receipt of this letter write and enquire in what respect the defendant's solicitors were dissatisfied with the title and what answers to their requisitions were unsatisfactory They offer to furnish all further information in their power as to the title, provided the defendant's solicitors specified in what respect further information was required On the 27th of February they again write and say —

"You have not pointed out how our answers show that our clients title is insufficient We are unable to discover that any justification exists for the position taken up by your client

They repeat their request for an explanation of the defendant's reasons for saying that their clients' title to the property was not a marketable title The letters written by the plaintiffs' solicitors at this stage evince very clearly a desire to give every information in their power and to do all they could to remove any doubts as to their clients' title in the minds of the purchaser's solicitors The defendant's solicitors, however, treat these

attempts in a very stand-offish manner All they think fit to say to Messrs Little & Co, in answer to their persistent enquiries, is in these terms

"We have already stated to you that your clients have failed to make out a marketable title to our satisfaction and that your answers to our requisitions are not at all satisfactory"

The plaintiffs' solicitors, however, do not relax their efforts to induce the defendant to complete the sale, and on the 29th of March 1909 they address a long letter in which they answer several of the requisitions which they had previously declined to answer and which they still maintain they were not bound to answer The defendant's solicitors however, do not change their attitude and on the 7th of April 1909, they repeat that the plaintiffs had failed to make out a marketable title and to answer the defendant's requisitions to their satisfaction and they make that a ground for a final intimation that by that letter their client put an end to the contract between him and the plaintiffs The defendant relies on this letter as the final rescission of the contract on his part and the case of the defendant has been argued before me on the basis that he formally and finally rescinded the contract on the 7th of April 1909

On behalf of the plaintiffs it has been contended that they had a perfect title to their property, that before the date of the completion they had made out a marketable title to the property and that they were entitled to insist on the defendant performing his part of the contract and completing the purchase It was further contended on behalf of the plaintiffs that the defendant had no right to rescind before the time for completion was up and it was pointed out on their behalf that if the defendant's solicitors had only chosen to make their doubts and difficulties clear to the plaintiffs' solicitors, no misunderstanding would have arisen and those doubts and difficulties would have been easily removed

The main question to be considered in the suit is, whether the plaintiffs have a marketable title to the properties which they contracted to sell to the defendant Incidentally other

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questions arise, such as, what effect should be given to the stipulation in the contract that the marketable title which the plaintiffs were to deduce was to be to the satisfaction of the defendant's solicitors, whether the defendant was entitled to rescind on the 7th of April as he purported to do, whether the plaintiffs had made out a marketable title before the alleged rescission, and lastly whether in any event the plaintiffs had not succeeded in making out a satisfactory marketable title at the hearing of the suit

There is no doubt in this suit that the purchaser's solicitors, Messrs Bicknell, Merwanji and Romer, have in clear and explicit terms intimated that the plaintiffs had not succeeded in deducing a marketable title to their satisfaction It is necessary, therefore, at the outset to ascertain what is the exact legal effect to be given to the stipulation in the contract that the plaintiffs were to deduce a marketable title "to their satisfaction' Mr Merwanji who attended to this matter, on behalf of the defendant, is a solicitor of very large experience, and I have no doubt whatever that the doubts and difficulties he felt with reference to the title were genuine doubts that arose in his mind In order to safeguard the position of his client and at the same time to save himself from any allegation of acting arbitrarily or capriciously, he submitted a case to counsel for his opinion, and a perusal of the case he submitted, together with the opinion thereon (Exhibit 7), clearly establishes that Mr Merwanji placed the case before counsel very fairly and that the learned counsel, whom he consulted, shared his doubts and difficulties Is that by itself sufficient to justify the defendant in putting an end to the contract? That I think necessitates a careful consideration of the question, what is the legal effect of such a clause in the contract? Mr Inverarity for the plaintiffs contended that the clause in the contract meant that all the solicitors forming the firm of solicitors who attended to this matter should have considered the question and formed an opinion before the plaintiffs' title was pronounced not marketable I doubt if Mr Inverarity was serious in this contention, for a clause such as I am now considering is not uncommon in agreements for sale of properties, and if every member of a firm of

solicitors acting for purch[illegible] opinion before this clause could [illegible] ously be a thoroughly u[illegible] firms all the partners are not alwa[illegible] be manifestly impracticable to expect th[illegible] firm of solicitors should independently [illegible] form an opinion before the opinion cont[illegible] could be given effect to In this ca[illegible] plaintiffs knew who the defendant's s[illegible] contract was made The senior partner of the firm Mr [illegible] was on the Board of their Directorate and they knew th[illegible] firm were the purchaser's solicitors They must, therefore, be taken to have agreed to the investigation of their title by a member of that firm

The question as to what is the legal effect of a stipulation similar to the one I am now considering, is discussed in the case of *Hussey* v *Horne Payne*(1) The Court of Appeal in that case held that the words "subject to the title being approved by my solicitor" were not merely an expression of what would be implied by law, but constituted a new term A careful perusal of the case as it was before the Court of Appeal, shows that the main question the Court was considering was not exactly what is the legal effect of such a clause or what was the exact meaning to be attached to such a stipulation, but the real question before the Court was, whether there was a concluded contract between the parties, and the Court held that there being no specific acceptance of *this particular term*, there was no concluded contract between the parties This appears to be clear from the judgment of Lord Justice Cotton, who says

'That being so these words introduce a new term and the letter is not an acceptance pure and simple of the offer contained in the previous letter '

Of course incidentally Lord Justice Cotton does discuss the effect of such a clause and says

This stipulation would make the solicitor, provided he acted reasonably and *boná fide* the sole and absolute judge as to whether there was or was not a good title

(1) (1878) 8 Ch D 670

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But the main question in the suit was, whether there was a concluded binding agreement between the parties, and it was held that "the insertion of this clause in the letter of acceptance by the purchaser was a new term and that the insertion of such a new term was not such an acceptance of the offer as would create a binding contract between the parties"

This same case went to the House of Lords[1] Lord Chancellor Lord Cairns in the course of his judgment discusses the question rather more fully with reference to what is the exact legal meaning and effect of such a clause in the contract He says —

I am disposed to look upon the words as meaning nothing more than a guard against its being supposed that the title was to be accepted without investigation as meaning in fact the title must be investigated and approved of in the usual way which would be by the solicitor of the purchaser Of course that would be subject to any objection which the solicitors made being submitted to decision by a proper Court, if the objection was not agreed to"

Mr Justice Wilson in *Sreegopal Mullick* v *Ram Churn Nus kur*[2] follows the decision of the Appeal Court in *Hussey* v *Horne Payne*[3] observing that the views expressed by the Lord Chancellor in the House of Lords, though they were sufficient to raise doubts in every mind, were still not grounds of decision and therefore he felt it his duty to follow the decision of the Appeal Court It seems to me that in spite of the fact that the views of Lord Cairns were not the grounds of decision, the reasons which he gives for the views he expresses are absolutely convincing in favour of those views Even the Court of Appeal are constrained to read a proviso in these terms while giving legal effect to its meaning For Lord Justice Cotton in holding that this clause introduces a new term in a contract, observes that this stipulation would make the solicitor "*provided he acted reasonably and bonâ fide*, the sole and absolute judge as to whether there was or was not a good title Ordinarily in a contract for the sale and purchase of immoveable property, in the absence of a special stipulation such as I am discussing the title previous to completion would necessarily

(1) (1879) 4 App Ca 311 (2) (1882) 8 Cal 856
(3) (1878) 8 Ch D 670

have to be investigated, and the proper person to investigate a title would naturally be the solicitor employed by the purchaser And I take it no purchaser would complete if his solicitor advised him that the vendor had not succeeded in making out a marketable title If in such a case the vendor insisted that he had made out such a title, the question would naturally be adjudicated by a Court of law It could, I think, hardly be contended that it is open to a purchaser, in whose contract such a clause is inserted, merely to say "the title is not made out to the satisfaction of my solicitors and therefore I refuse to complete" Such a construction would, as observed by Lord Cairns, "*reduce the agreement to that which is illusory*" and would leave a vendor absolutely at the mercy of the purchaser It seems to me, however, that although there was a difference of opinion between the Court of Appeal and the Lord Chancellor in *Hussey* v *Horne-Payne*[1], so far as the question of what is the true effect of such a stipulation, there is no real difference between the views expressed by the Appeal Court and the Lord Chancellor For even the Appeal Court, although it was of opinion that the clause in question introduces substantially a new term, the meaning they give to that term by reading into it a proviso that the solicitor acted reasonably and *bonâ fide*, safeguards the vendors of properties from many difficulties which the Lord Chancellor foresaw, if such a clause was construed as giving an arbitrary and absolute power to the purchaser's solicitors to reject a title made out by the vendor, however good such a title may be The true view I think of this clause is taken by Lord Justice Lindley in *Clack* v *Wood*[2] In the course of his judgment his Lordship observes

> The plaintiff sues on a written agreement which contains the words subject to the title being approved by my solicitor What had the plaintiff to do at the trial? He ought either to have proved that the title was approved or that there was such a title tendered as made it unreasonable not to approve it

Having regard to these authorities, I am of opinion that it is not sufficient for the defendant in this case to avoid his obligations under the contract to complete the sale by merely showing that his solicitors were not satisfied that the title made

(1) (1878) 8 Ch D 670 (2) (1882) 9 Q B D 276

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out by the plaintiff was a marketable one. As observed by Lord Justice Cotton, in the Court of Appeal in *Hussey v. Horne Payne*[1], he must also satisfy the Court that his solicitors acted reasonably and *bonâ fide*.

Now in this case there is no question about Mr. Merwanji's *bonâ fides*. There is no doubt in my mind that Mr. Merwanji acted with the most scrupulous good faith. He did not trust to his unaided opinion, but submitted a straightforward case to an eminent member of our Bar, and it was only when his doubts were confirmed that he adopted the attitude he did. The question then is, did he act reasonably? Lord Justice Lindley's language in *Clack v. Wood* makes it quite clear as to what would be under similar circumstances reasonable conduct. Of the two things that a vendor has to establish, when he desires to enforce a contract for sale with a condition that the title adduced should be to the satisfaction of the purchaser's solicitors, would be either to prove that the solicitors did approve of the title or that there was such a title tendered as made it unreasonable not to approve of it. The effect of all this is that the plaintiffs, before they can succeed in compelling the defendant to perform his part of the contract, have to establish that they adduced and tendered such a title to the defendant that the rejection of it by the defendant's solicitors was unreasonable. It would, therefore, be necessary now to examine what was the title made out and tendered by the plaintiffs to Mr. Merwanji. Was it such a title as would induce the Court to hold that its rejection by Mr. Merwanji was unreasonable?

The plaintiffs have tendered to the Court evidence of their title to the property in question which is mainly documentary evidence produced from the records to the Collector of Bombay and from other sources. The Collector's Head Surveyor Mr. Vaidya, has given very useful evidence in the case and has produced many documents from his office, tracing the history of the different pieces of land which go to make up the property now contracted to be sold by the plaintiffs. The history of the different plots making up the land on which the defendant's

(1) (1878) 8 Ch. D. 670.

building stands, is traced by Mr Vaidya from as early a date as 1821 It is true that some of the documents produced on the plaintiffs' behalf were not discovered till after the hearing commenced They, no doubt, help the Court to a certain extent I think, however, that it would be but fair to the defendant to confine the consideration of the question to such evidence as was available in support of the plaintiffs' title, before the defendant's solicitors finally pronounced their decision and rescinded the contract Were the materials that were at the disposal of the defendant's solicitors *and available to him* sufficient to establish a title the rejection of which would be considered by the Court to be unreasonable ? Exhibit A 37 shows that the search taken by the clerk of the defendant's solicitors was a fairly thorough and exhaustive search and was intelligently conducted I feel perfectly certain that if the records in the Collector's office were personally inspected by Mr Merwanji himself, if he had seen what his clerk seems to have seen, if the various entries and documents produced from the Collector's office had been before Mr Merwanji's own eye, many of his doubts would undoubtedly have disappeared There is no doubt that certain inaccuracies crept into the answers given by the plaintiffs' solicitors to his requisitions Those mistakes were due to a difference in alphabetical marking of certain plots of land on different plans, with the result that they aggravated the doubts which had already been engendered in Mr Merwanji's mind The discovery of other documents, more especially of the agreement of the 17th of June 1870, Exhibit A 29 explains away some of these mistakes When however, one carefully scrutinizes Exhibit A 37, which shows what materials were at the disposal of the defendant's solicitors, no doubt is left in my mind that what was in the Collector's office and in the documents furnished to the defendant's solicitors by the plaintiffs solicitors, afforded ample materials to establish that the plaintiffs had in them more than a marketable title to the property which they contracted to sell It was said on the defendant's behalf that the services of Mr Vaidya were not at their disposal and that the explanations which he gave to the Court when producing the various documents before it, were not available to the defend-

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ant's solicitors There is no doubt that Mr Vaidya's evidence has materially assisted the Court in understanding the various documents tracing the history of the different plots of land in question Mr Vaidya seems to have studied the history of this land some time ago for other purposes and I have no doubt in my mind that if he had been asked to give any information or furnish any explanation of any particular entry in the Collector's books or of the documents in the files of the Collector's office, Mr Vaidya would have done so Mr Merwanji had not before him the original entries and the documents inspected by his clerk If he had, I think many of his doubts would have been dissipated I cannot help thinking that if Mr Merwanji, instead of treating the advances and overtures of the plaintiffs' solicitors in the stand-offish manner in which he did, had responded to them and met them in another spirit by explaining to them his doubts and difficulties, he would have been in a very much better position to form his opinion and would have formed a more correct opinion as to the plaintiffs' title than he did He may have been strictly within his rights in refusing to say more than he did say in his correspondence But as the evidence proceeded before me and the title was traced and explained to me, I could not resist a conclusion growing in my mind that Mr Merwanji would have understood a great deal better the effect of what his clerk had seen, if he had those materials under his own observation That Mr Merwanji's studied silence and refusal to divulge the nature of his objections were in a great measure responsible for the error into which he fell and the error into which he led his counsel, is clear from the incident with reference to the form of the deed of enfranchisement of Sanadi land In the agreement between the parties it was provided that the portion of the plaintiffs' land which was originally acquired under sanads and which is spoken of as Sanadi land was to be by them converted into quit and ground rent tenure and sold as such The plaintiffs entered into negotiations with the Collector for the necessary conversion and it was eventually agreed that in consideration of a payment of Rs 50,000 to Government the Sanadi land was to be converted into land of quit and ground rent tenure The defendant wanting inform

ation applied to the Collector for the form of the proposed enfranchisement deed and that form was sent to him When the form was taken to the defendant's solicitors, he felt that the words in it "or other the quit and ground rent for the time being payable" were objectionable He seems to have formed a notion that if his client accepted the enfranchisement deed in that form, he might be taken to have acquiesced in the contention of Government that they were entitled at any time to raise the quit and ground rent payable for the land Having formed this notion, he studiously keeps it to himself, never informs the plaintiffs' solicitors that one of his main objections was the presence of those words in the deed and it is not till the written statement is declared on the 28th of August 1909 that the plaintiffs' solicitors come to know that one of the defendant's contentions was that "he was not bound to accept a document of enfranchisement in the form submitted by the plaintiffs' solicitors with their answer to the said requisition, inasmuch as under the said form of document the defendant by reason of the covenants therein contained, would be precluded from resisting any future increase of the amount of the quit or ground rent which Government might seek to impose but would be liable to pay such increased quit or ground rent" This objection is formulated for the first time in the written statement It is no doubt true that those words objected to by Mr Merwanji appear in the form annexed to the answers to requisitions and also appear in the form sent to the defendant by the Collector Now the true facts, as deposed to by Mr Vaidya are that this form was in the first instance put forward and adopted by Government on the 2nd of March 1907 as will appear from the endorsement on Exhibit A-5 On the 4th of December 1908, however Government altered the form and omitted the words that were objectionable in Mr Merwanji's opinion, as will appear from the endorsement on Exhibit A-6 If Mr Merwanji had only drawn the attention of the plaintiffs' solicitors to this objection on his part, I have no doubt enquiries or representations would have been made in the Collector's office and it would have been discovered without any difficulty that the form had been altered and that by some oversight or mistake the Collector's

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office had sent to the defendant the old form which had been abandoned In fact, Mr Merwanji had the new form before him on the 16th or 17th of August 1909 before the defendant's written statement was declared His attention seems to have been actually drawn to the omission of the objectionable clause and yet he sits absolutely silent and never gives the plaintiffs a chance of rectifying the mistake and removing the misunderstanding As a matter of fact, the plaintiffs have obtained enfranchisement of their Sanadi land in the form that does not contain the clause objected to by the defendant's solicitors It is true they obtained this on the 14th of December 1909 but it is clearly established that the plaintiffs, after the 4th of December 1908, were in a position to obtain the form in which they eventually did obtain it, without any difficulty at any time that the defendant was ready to complete It has been urged on behalf of the defendant that the plaintiffs' solicitors were wrong in refusing to answer certain requisitions I think the plaintiffs' solicitors, strictly speaking, were within their rights in refusing, as they did, to answer some of these requisitions

In *In re Ford and Hill*[1] the Court of Appeal held referring to similar requisitions as were made in this case that 'such questions by the purchaser's solicitors were not proper questions to be put in requisitions to title' Lord Justice James says 'I am of opinion that the question put by the purchaser is anything but a requisition It is a searching interrogatory put to the vendors and their solicitors," and it was held in this case that neither the vendors nor their solicitors were bound to answer any part of the requisition

Whether the plaintiffs' solicitors were wise in refusing to answer the requisition, is another question, but the fact remains that in their desire to avoid conflict, they eventually did most fully answer the requisitions in their letter of the 29th of March 1909 As I observed before the plaintiffs' solicitors were undoubtedly in error in the explanation they give with reference to certain small plots of land which go to make up the whole of the land contracted to be sold How this mistake arose would

(1) (1879) 10 Ch D 365

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become quite clear at a glance by putting the two plans, one annexed to Exhibit A 19 and another annexed to Exhibit A 29, side by side The plot marked B in Exhibit A 19 happens to be marked C in Exhibit 29 The plot which is marked C in Exhibit A 19 is marked D in Exhibit A 29, and the plot which is marked D in A-19 is marked B in A 29 At the time when this misunderstanding arose, unfortunately Exhibit 29 had not been discovered, and hence the difficulties in identifying the plots by letters and making the measurements of these plots fit in with the plots described by alphabetical lettering I do not think, however, that that mistake has any real effect on the question between the parties As I have observed above, if Mr Merwanji had been less reserved, if he had not held Messrs Little & Co at arm's length, if there had been interviews between the respective solicitors, if Mr Merwanji himself had inspected the records in the Collector's office and seen the entries and the documents there for himself, I have no doubt that all his doubts would have vanished

The evidence as to the plaintiffs' title consists mainly, as I have observed above of documents which come from the Collector's custody and other sources Since the hearing, I have carefully gone through the documentary evidence recorded in this case by the light of the oral evidence given by Mr Vaidya and I have come to the conclusion that the plaintiffs have made out a much better title to their property than a great many people in Bombay would be able to make out with respect to a great many properties I do not propose to go into a detailed discussion of the various documents that go to prove the plaintiffs' title to the property they contracted to sell It seems to me that the discussion before me as to whether the plaintiffs were bound to make out a 60 years' title as contended by Mr Jardine, or whether the defendant was bound to accept a 20 years' title, as contended by Mr Inverarity for the plaintiffs, is of no real importance in this case The plaintiffs in this instance have been able to make out a satisfactory title which extends to a period considerably over 60 years, and many of the objections that were urged on behalf of the defendant seem to me to be without any substance For instance, Mr Jardine contended that there

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was a discrepancy of somewhere about 45 square yards He said, the plaintiffs purport to sell 4,116 square yards and they have proved title to only 4,071 square yards Now it must be remembered that the plaintiffs never contracted to sell so many square yards of land All they contracted to sell was their Byculla property and therefore the question of the discrepancy of a few yards in measurement, even if real, is to my mind of no consequence The defendant presumably knew the plaintiffs property and knew what he was buying and there was no question between them of the actual area of the property Both the parties understood perfectly well what they were selling and buying Equally unsubstantial, I think, was the contention on the part of the defendant that he was entitled to rescind and repudiate because there might possibly be some incumbrance created between the years 1859 and 1865 Mr Jardine contended that the absence of the original deed poll was compatible with the firm of Treacher & Co having mortgaged the property between 1859 and 1865 It seems to me that this apprehension is identically the peril which was pleaded in *Moulton* v *Edmonds* (1) and which the Lord Chancellor stigmatized as "imaginary and chimerical" and the observations of the Court at page 252 of the report are, I think, a complete answer to the apprehension expressed on behalf of the defendant When the title of the defendant is traced by the light of the documents before the Court, it seems to me that the title is one that any Court would accept as a perfectly *good* title

I propose now to trace very shortly the history of the different parcels of land which go to make up the whole piece of land *on which the plaintiffs' buildings at present stand* In referring to the different plots of land, I propose to refer to them as they appear on the plan annexed to Exhibit A-19 It appears that as early as 1821 one Kazi Shail Dawood bin Mahomed Saha owned a portion of this land In 1824 he acquired two more pieces of land by two different sanads and he was from that date the owner of the whole of the land in question in this suit From 1824 up to 1830 all plots of land

(1) (1859) 1 De G F & J 243

were in the possession of Kazi Shaik Dawood In 1839 he seems to have made a default in paying the Government dues and the land was sold and purchased by the late Mr Manekji Cursetji, who, during his life time, was a prominent citizen of Bombay Mr Manekji Cursetji held the land from 1839 to 1849 and during his occupancy he used a portion of the land for quarrying stone, with the result that the quarry was converted into a tank In 1849 Manekji Cursetji made over this tank to Government for public purposes, as the supply of water was scarce in that locality The tank was given for the use of the public as a memorial to his late father It was subsequently exempted from the payment of the ground rent, and by orders of Government rent to the extent of Rs 46-13 2 being the proportionate rent of the land given up, was remitted by Government The land so given up by Mr Manekji Cursetji is designated as tank land and appears on the plan attached to Exhibit A 19 marked with the word Tank After he gave up the tank land fo the use of the public in the year 1850 by a deed-poll bearing date the 14th of December 1859, he conveyed two plots marked A and D to the firm of Treacher & Co These two plots A and D remained in the possession of the firm till they were conveyed to the limited liability Company, the present plaintiffs So that so far as plots A and D are concerned, we have the fact that they were from 1824 to 1839 in the possession of Kazi Shaik Dawood, from 1839 to 1859 they were in the possession of Mr Manekji Cursetji, from 1859 to 1867 they were in the possession of Treacher & Co, and from 1867 up to date they have been in the possession of the plaintiffs Then we have two small plots B and C These plots in the first instance formed a portion of the tank land and got into the possession of the Municipality The major portion of the tank land eventually came back to Mr Manekji Cursetji but these two small portions never came to his possession and remained with the Municipality The firm of Treacher & Co acquired these plots in the early sixties, one I think in 1860 and another in 1863 from the Municipality The Municipal authorities do not appear to have obtained the previous sanction of Government to the sale of these and other plots of land in Bombay but

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Government acquiesced in the said sales and waived all objections to these sales on their part by re assessing and re imposing the usual quit and ground rent assessment on these plots The firm of Treacher & Co held these plots till 1867 and from that time the present plaintiffs have been in possession The only flaw in the title to these plots that can possibly be urged, is that the Municipality were not entitled to sell without Government sanction Government condoned this informality in the sales and practically assented to them when they re imposed quit and ground rent tax, and I think any apprehension that the title of the plaintiff would be imperilled after so many years of uninterrupted and undisputed possession merely because of this informality or defect in the sale would, I think, come well under the category of perils that were stigmatized as "imaginary and chimerical"

The only other plot that remains to be considered is the tank land This plot was in Shaik Dawood's possession between 1823 and 1839 In 1839 Mr Manekji Cursetji acquired it at the Collector's sale He held it till 1849 The Municipality remained in possession of it from 1849 to about 1865 Mr Manekji re acquired this land under certain terms which it is unnecessary to set out here and he eventually sold the land to the present plaintiffs by a conveyance dated the 1st of August 1870, Exhibit A 29, and the plaintiffs have retained possession of the land ever since

This shortly is the history of the different plots of land which go to make up the property contracted to be sold There can, I think, be no doubt that the title, such as the plaintiffs have made out to their property, is, to put it at the very lowest, certainly a marketable title As I observed above it is a better title than many owners in Bombay could make out to their property It extends to a period considerably beyond sixty years and to my mind it is an unimpeachable title that the plaintiffs have succeeded in making out to their property To reject such a title is to my mind unreasonable, and I find that Mr Merwanji was not right when he decided that the plaintiffs had failed to make out a marketable title The opinion, no

doubt, was honestly formed in the light of what was before Mr Merwanji, but in my opinion he failed correctly to appreciate the materials, reference to which his investigating clerk had placed before him The learned counsel, to whom the case was submitted, shared Mr Merwanji's doubts and difficulties because he really had not before him everything that should have been placed for his consideration Mr Merwanji was content to place before counsel all that was before him, but all that was before him was not all that he could have had if he had either personally investigated the Collector's records and inspected all the entries and documents referred to by his clerk in Exhibit A 37 and if he had been a little more open and communicative to the vendor's solicitors In spite of all his doubts, Mr Lowndes does in his opinion say that "the title is a fair holding one and might be accepted without much risk, if the vendor Company would give an indemnity bond They are a substantial Company whose indemnity would, I imagine, be a fair security" Mr Merwanji seems to have ignored this portion of counsel's opinion altogether and never suggested the plaintiffs giving the defendant an indemnity bond

Having regard, therefore, to all the circumstances of this case, I have come to the conclusion not only that the plaintiffs have a marketable title to their property and have established it to the satisfaction of the Court but that they had made out a marketable title before the same was rejected by the purchaser's solicitors

I further hold that to reject a title such as was tendered, was under the circumstances unreasonable and that the consequent attempt to rescind the contract on the part of the defendant was wholly unjustifiable

[After finding on the various issues his Lordship proceeded—]

I hold that the plaintiffs are entitled to specific performance of the contract, and decree that the defendant do pay to the plaintiffs the sum of Rs 1 50,000 with interest thereon at 5 per cent per annum from the 1st of October 1908 till payment—the plaintiffs in their turn to convey the premises contracted to be sold and give vacant possession thereof to the defendant

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I have considered the question of costs and have come to the conclusion that the defendant must pay to the plaintiffs their whole costs of this suit Even after the plaintiffs had led their evidence and proved their title, the defendant up to the very last persisted in maintaining that they had no marketable title to their property I do not think this is a case in which any portion of the plaintiffs' costs should be disallowed

Attorneys for the plaintiffs Messrs *Little & Co*

Attorneys for the defendant Messrs *Bicknell, Merwanji & Romer*

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ORIGINAL CIVIL

Before Sir Basil Scott Kt Chief Justice and Mr Justice Batchelor

1910 *August 18*

PURSHOTUMDAS RAMGOPAL PLAINTIFF AND APPELLANT, v RAM GOPAL HIRALAL AND OTHERS DEFENDANTS AND RESPONDENTS *

Arbitration—Statement of special case for opinion of Court—Appeal from order of Court—Civil Procedure Code (Act V of 1908) section 104 and Schedule II, rule 11—Indian Arbitration Act (IX of 1899) section 10

In a suit filed for partition of joint family property the parties agreed to refer the matter to arbitration and a consent order of reference was taken A similar agreement referred to the same arbitrators questions as to the partition of such immoveable property as was outside the jurisdiction of the Court in the suit

The arbitrators disagreed on certain points but instead of referring their differences (as the agreements of reference authorised them to do) to an umpire, they submitted their own opinions in the form of a special case for the opinion of the Court In doing so they purported to act under the provisions of the

* Original Suit No 781 of 1908
Appeal No 19 of 1910

Civil Procedure Code (Act V of 1908) Schedule II, rule 11(1), and of the Indian Arbitration Act (IX of 1899), section 10 (b)(2)

The matter was decided by the Chamber Judge and an appeal was preferred against the decision

Held that no appeal lay

Inasmuch as the special case was in no sense an award it did not come within the Civil Procedure Code (Act V of 1908) Schedule II rule 11(1) but, in so far as it related to the agreement which was not the subject of the Court's order, it fell under the Indian Arbitration Act (IX of 1899) section 10 (b)(2)

SUIT No 781 of 1908 was filed by the abovenamed plaintiff against his father and brothers for partition of the joint family property, save such as was situate outside the jurisdiction of the High Court Subsequently, on 9th July 1909, two agreements of reference to arbitration were entered into by the parties The first related to the matters in dispute in the suit, and the second to the property situate outside the jurisdiction On 16th July 1909 a consent order was taken in the suit, sanctioning the first agreement as for the benefit of the minor 3rd defendant, and referring the matters to arbitration All the disputes with regard to the property were thus referred to the arbitration of Messrs Malvi and Merwanji, two Attorneys of the High Court, with power in case of disagreement to refer to an umpire

In the course of the arbitration proceedings the question arose as to whether provision should be made for the marriage expenses of the 3rd defendant and for the maintenance and marriage expenses of the 1st defendant's daughter, Ratni, before ascertaining what was joint property for the purposes of partition The arbitrators were unable to agree on the question,

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(1) Upon any reference by an order of the Court the arbitrator or umpire may with the leave of the Court state the award as to the whole or any part thereof in the form of a special case for the opinion of the Court and the Court shall deliver its opinion thereon and shall order such opinion to be added to and to form part of the award

(2) The arbitrators or umpire acting under a submission shall unless a different intention is expressed therein —

(b) have power to state a special case for the opinion of the Court on any question of law involved

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but, instead of referring it to an umpire, they set out the facts and their own opinions thereon and submitted them in the form of a special case for the opinion of the High Court The case so submitted purported to be a "special case pursuant to the provisions of rule 11, 2nd Schedule of the Code of Civil Procedure, and section 10, clause (b) of the Indian Arbitration Act"

The matter came before Macleod J in Chambers, and the learned Judge held that before partitioning the joint family properties a reasonable sum should be set apart for the marriage expenses of the 3rd defendant and a reasonable sum should also be presented to Ratni to be appropriated to her marriage and "Moklava" expenses

The plaintiff appealed

Jayakar, with *Setalvad*, for the appellant

Desai, for the 1st respondent

Bhandarkar, for the 2nd and 3rd respondents

SCOTT C J —The question arises in this case at the outset whether any appeal will lie

The appeal is preferred against an opinion expressed by the learned Chamber Judge upon a special case stated to him, purporting to be stated in the matter of an arbitration between the plaintiff and the defendants in Suit No 781 of 1908, pursuant to a Consent Judge's Order of the 16th July 1909 and in the matter of the Indian Arbitration Act, 1899, and an arbitration between Purshotumdas Ramgopal, and Ramgopal Hiralal, Badrinarayan Ramgopal and Keshavdeo Ramgopal, pursuant to an agreement between them, dated the 9th July 1909 The parties to this last named agreement are the parties to Suit No 781

The special case states that the suit was instituted for partition of the properties other than the immoveable properties situate outside the jurisdiction of the Court belonging to the joint family consisting of the plaintiff and the defendants On the 9th of July 1909 two agreements were entered into between the parties

Clause 3 of the special case states —

By the first agreement the parties agreed *inter alia* to refer to the award determination and final arbitration of Messrs Tribhuwandas Narotamdas Malvi and Merwanji Kaikhusro Alpaiwalla Attorneys of this Honourable Court to ascertain and determine the moveable properties and assets specified in the said agreement belonging to the said joint family in which the said arbitrators might hold the said Purshotum Ramgopal entitled to the reliefs claimed in the above suit and to effect a partition of the said properties between the parties on the footing that each of them was entitled to an equal one fourth share therein

Clause 4 says —

'By *the second agreement the parties agreed to refer to the award, determination* and final arbitration of the said Messrs Tribhuwandas Narotamdas Malvi and Merwanji Kaikhusro Alpaiwalla to ascertain the properties other than those that may be held by the said arbitrators to be covered by the aforesaid suit and to take necessary accounts in respect thereof and to effect a partition thereof between the parties on the footing aforesaid

Clause 5 states —

"By a Consent Judge's Order dated the 16th July 1909 made in the said suit the said first agreement of reference was declared to be for the benefit of the 3rd defendant and sanctioned and it was ordered that the matters mentioned in the said agreement of reference be referred to the arbitration of the said arbitrators

Then the case proceeds to state certain questions which have arisen as to whether moneys should be set apart for the marriage expenses of certain male and female members of the family and for the maintenance of a girl named Ratni Clauses 12, 13 and 14 are as follows —

'12 The arbitrator Tribhuwandas Narotamdas Malvi awards that no sum should be set apart for the expenses of marriage of Keshavdeo, or for the expenses of marriage and 'Mokla a and maintenance of Patni nor in the alternative any sum presented to her which may be appropriated for her marriage expenses

13 The arbitrator *Merwanji Kaikhusro awards that a reasonable sum* should be set apart for the expenses of marriage of Keshavdeo and for the expenses of marriage 'Moklava and maintenance of Patni or in the alter native a reasonable sum may be presented to her out of the joint family property which may be appropriated for her marriage expenses

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"14 The questions of law for the opinion of the Court are whether before partitioning the said joint family properties a reasonable sum should be set apart by the arbitrators out of the said properties

'(1) To provide for the marriage expenses of the 3rd defendant Keshavdeo, the unmarried son of Ramgopal Hiralal, the 1st defendant and

(2) To provide for the maintenance, marriage and 'Moklava expenses of Bai Ratni, the unmarried daughter of the 1st defendant

'(3) Or, in the alternative, a reasonable sum may be presented to her which may be appropriated for her marriage and 'Moklava expense '

It was necessary to provide for the reference to the arbitrators by the two agreements because owing to want of jurisdiction all the questions between the parties could not be raised in the suit in which the Consent Order was made

Now, where there is a reference with the intervention of a Court of justice, the provisions of the Indian Arbitration Act do not apply, and the powers of the arbitrators are governed by the 2nd Schedule of the Civil Procedure Code (See the preamble to the Indian Arbitration Act and section 89 of the Civil Procedure Code) Therefore, with regard to the arbitration so far as it affects the subject of the suit the arbitrators could only take the opinion of the Court under rule 11 of Schedule II of the Civil Procedure Code, which provides that upon any reference by an order of the Court, the arbitrator or umpire may, with the leave of the Court, state the award as to the whole or any part thereof in the form of a special case for the opinion of the Court, and the Court shall deliver its opinion thereon and shall order such opinion to be added to and form part of the award With regard to the other agreement of the 9th of July the provisions of the Indian Arbitration Act apply The only section of that Act, which gives the arbitrators power to take the opinion of the Court, is section 10 (*b*), which provides that they shall have power to state a special case for the opinion of the Court on any question of law involved

It is conceded that if the arbitrators are merely stating a case for the opinion of the Court before they have made an award no appeal lies, as has been decided, in England with reference to section 19 of the Indian Arbitration Act of 1889,

in *In re Knight and Tabernacle Permanent Building Society*[1] and *In re Holland Steamship Company and Bristol Steam Navigation Company*[2] It is, however, contended that this special case is an award in the form of a special case which the arbitrators were competent to submit either under rule 11 of the 2nd Schedule of the Civil Procedure Code or section 10 of the Indian Arbitration Act, and that an appeal is expressly provided for by section 104 of the Civil Procedure Code

With reference to the scope of section 10 (*b*) of the Indian Arbitration Act, it is material to note that in the English Arbitration Act, upon which the Indian Arbitration Act was based, there are two sections providing for references to the Court by arbitrators, namely section 7 (*b*), which permits the arbitrators to state an award as to the whole or part thereof in the form of a special case for the opinion of the Court, and section 19, which permits them to state, in the form of a special case for the opinion of the Court, any question of law arising in the course of the reference It appears to us that the legislature in framing section 10 (*b*) of the Indian Arbitration Act has deliberately followed the wording of section 19 of the English Act and in framing rule 11 of the 2nd Schedule of the Civil Procedure Code has followed the wording of section 7 (*b*) of the English Act

According to the decisions of the Court of Appeal in England in *In re Knight and Tabernacle Permanent Building Society*[1] and *In re Kirkleatham Local Board and Stockton & Middlesborough Water Board*[3], an appeal lies from the opinion of the Court expressed upon an award stated in the form of a special case, and that is provided for by section 104 of the Civil Procedure Code

It has, therefore, been necessary for counsel on behalf of the appellant to argue that the special case with which we are concerned is an award stated in the form of a special case This argument is only material with reference to the arbitration proceeding under the Consent Judges Order of the 16th of

(1) [1892] 2 Q B 613 (2) (1906) 95 L T 769

(3) [1893] 1 Q B 375

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July The agreement which was adopted by that order provides that "the arbitrators are authorised from time to time to make an *interim* award or awards or make or direct partial distribution or distributions of the said property and in case the said arbitrators shall by reason of disagreement or any other cause fail to make an award or determine any matter or matters hereby referred to them, the matter or matters as to which there shall be such failure be and they are hereby referred to the umpirage and decision of such person as the said arbitrators shall before entering upon this reference appoint to act as umpire who shall likewise have authority to make an *interim* award or awards" The agreement, therefore, provides that in the case of disagreement between the arbitrators which prevents them from making an award such as is contemplated in the agreement, the matter in difference is to be referred to an umpire who shall make the award

Now, the special case discloses a difference of opinion between the arbitrators, and there has been no reference to any umpire, and we are unable to hold that the mere use (in our opinion, a mistaken use) of the word ' award" in clauses 12 and 13 of the special case, converts a reference to the Court for its opinion upon a difference between arbitrators into an award in the form of a special case The special case is in no sense an award The award would have to provide, if any provision is in law necessary for the expenses of the marriage of Keshavdeo or of Ratni, what sum should be set aside, but no sum is mentioned in the case as having been agreed upon between the arbitrators as a reasonable and proper sum Again, the special case leaves it open to the Court to take a view which is not the view of either of the arbitrators upon the questions submitted

There is therefore, no award which can be adopted by the Court by the mere expression of its opinion, and the case can only be, as it is expressed to be in clause 14, a statement of a question of law for the opinion of the Court

We are of opinion that this is not a case which falls under rule 11 of the 2nd Schedule of the Civil Procedure Code, but that it falls under section 10 of the Indian Arbitration

Act in so far as it relates to the agreement which was not the subject of the Court's order of the 16th July 1909, and that, therefore, no appeal lies

We dismiss the appeal with costs

Appeal dismissed

Attorneys for the appellant Messrs *Malvi, Hiralal, Mody and Ranchhoddas*

Attorneys for the respondent Messrs *Bicknell, Merwanji and Romer*

R. McL. R.

CRIMINAL REVIEW

Before Mr Justice Batchelor and Mr Justice Rao

EMPEROR v. FULJI DITYA.*

1910 *September 9*

Criminal Procedure Code (Act V of 1898) section 565—Indian Penal Code (Act XLV of 1860) section 75—Whipping Act (IV of 1909) section 5—Sentence of whipping only passed on accused—Order to accused to notify his residence—Validity of the order

Section 565 of the Criminal Procedure Code (Act V of 1898) must be strictly construed The order contemplated by the section can only be made at the time of passing sentence of transportation or imprisonment upon a convict It cannot be made where the Court instead of passing that sentence passes a sentence of whipping

THE High Court sent for the papers of this case on review of statement of criminal work

The facts of the case are stated in the judgment

L. A. Shah, acting Government Pleader, for the Crown

There was no appearance for the accused

BATCHELOR, J :—In this case one Fulji valad Ditya has been convicted of house breaking under section 451 and of having suffered certain previous convictions which bring his case within

* Criminal Review No 232 of 1910

1910

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section 75 of the Indian Penal Code The sentence upon him was that he should suffer 30 stripes under the Whipping Act IV of 1904, and to that sentence there was added an order, under section 565 of the Criminal Procedure Code, directing that the convict should notify his residence or change of residence for a period of five years

We called for the papers in the case in order to satisfy our selves whether this order under section 565 could be supported, and we have heard the learned Government Pleader in its favour We are of opinion that the order cannot stand So far as the plain words of section 565 go it seems to us clear that the order cannot be brought within them For the section in terms allows of such an order being made only at the time of passing sentences of transportation or imprisonment on the accused, and it provides that his residence and change of residence "after release" be notified

It seems clear that where there is no sentence of transportation or imprisonment and no release of the convict thereafter the section does not justify the making of such an order

The Government Pleader has, however, called our attention to the fact that the words of section 565 of the Criminal Pro cedure Code professedly follow the words of section 75 of the Indian Penal Code, and, therefore, are limited to the case of a sentence of transportation or imprisonment as described in section 75 of the Penal Code, and it is urged that the Court convicting the accused person is not deprived of its power to make this order under section 565, merely by reason of the circumstances that instead of passing a sentence of transporta tion or imprisonment it prefers that alternative sentence of whipping which is a mere substitute for transportation or im prisonment, and in support of this argument it is pointed out that whereas section 565 was added to the Code in 1898, the present Whipping Act did not become law until 1909

This latter argument, however, which might otherwise have force seems to us to be met by the fact that when section 565 was enacted in 1898 there was on the Statute Book a Whipping Act, namely, VI of 1864, which, so far as we are concerned with

it, was identical with the latter Act of 1909 That being so, it seems to us that section 565 must be construed strictly and that when the Legislature says that such an order, as is there described, may be made at the time of passing sentence of transportation or imprisonment so as to provide for a certain notification after the release of the convict, it must be taken that the Court's power is limited to the cases there specifically described, and does not extend to cases where the Court, instead of passing that sentence, passes a sentence of whipping

1910

EMPEROR v. FULJI DITTA

For these reasons we set aside the order under section 565 of the Criminal Procedure Code

Order set aside

P R

APPELLATE CIVIL

Before Mr Justice Chandavarkar and Mr Justice Heaton

CHANMALAPA CHENBASAPA TENGINKAI (ORIGINAL PLAINTIFF) APPELLANT v ABDUL VAHAB VALAD MAHOMED HUSEN SAHEB KHATIB (ORIGINAL DEFENDANT) RESPONDENT *

1910 August 1

Limitation Act (XV of 1877) section 14—Court—Interpretation—Court in British India—Court in a Native State in India not included

The word Court as used in section 14 of the Indian Limitation Act (XV of 1877) means a Court in British India and not a Court in a Native State of India

APPEAL from the decision of Mr R G Bhadbhade, First Class Subordinate Judge, at Dharwar

Chanmalapa (the plaintiff) lent Rs 10,000 to Ladsaheb and Mahomedsaheb on a hypothecation bond passed by a letter on the 30th June 1899, and the defendant Abdul Vahab passed to him a letter of security for the debt on the 21st March 1901

The plaintiff filed a suit to recover the money against all of the three persons in the District Court of Shimoga (Mysore

* First Appeal No 104 of 1909

1910

EMPEROR v FULJI DITYA

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1910

EMPEROR
v
FULJI DITYA

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F R

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Before Mr Justice Chandavarkar and Mr Justice Heaton

CHANMALAPA CHENBASAPA TENGINKAI (ORIGINAL PLAINTIFF) APPELLANT v ABDUL VAHAB VALAD MAHOMED HUSEN SAHEB KHATIB (ORIGINAL DEFENDANT) RESPONDENT *

1910
August 1

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* First Appeal No 104 of 1909

1910

CHANNMALAPA CHENBASAPA v ABDUL VAHAB

State) on the 29th July 1903 The Court passed a decree in his favour, but it was reversed on appeal by the Chief Court of Mysore on the 26th August 1907, on the ground that the Mysore Court had no jurisdiction to entertain the suit as the cause of action had arisen in British India

The plaintiff filed the present suit in the Court of the First Class Subordinate Judge at Dharwar on the 29th October 1907, to recover the amount due from the defendant He contended in his plaint that the time occupied in the litigation in Mysore Court ought to be excluded under the provisions of section 14 of the Limitation Act

The defendant contended *inter alia* that the claim was barred by limitation

The Subordinate Judge held that section 14 of the Limitation Act did not apply to proceedings in a foreign Court and that the claim was therefore time barred

The plaintiff appealed to the High Court

Jayakar, with *G S Mulgaonkar*, for the appellant —

The term "Court" in the Limitation Act is not expressly restricted to a "Court having jurisdiction in British India or established by Government in British India", nor is a definition of a "foreign Court" given in the Limitation Act as in the Code of Civil Procedure, section 2 (5) "Foreign Court" is defined in the Limitation Act section 2 (6), and foreign contracts are recognized in section 11 If the legislature had contemplated only British Courts, they would have defined the term as in the Civil Procedure Code The word "Court" by itself would include a foreign Court, *e g*, see Civil Procedure Code (1882), section 13, and Field on Evidence, p 347, 4th Edition, and *Bababhat* v *Narharbhat*[1], *Prithisingji* v *Umedsingji*[2] Also in the Evidence Act, though "Court" is not defined, it includes a foreign Court, *e g*, see section 41 and the following sections

Test the question in another way by observing the position foreign Courts occupy in British India They are recognized for a more important purpose than limitation, *viz*, for *res*

(1) (1888) 13 Bom 224 (2) (1903) 6 Bom L R 9?

1910

CHANMALAPA CHENBASAPA *v.* ABDUL VAHAB

judicata. Tendency of modern legislation is to regard foreign Courts more and more for the purpose of adjective law, *e. g.*, compare section 14 of the Civil Procedure Code (1908) with section 13 of the Civil Procedure Code (1882). Also for purposes of execution foreign decrees are recognized. In this case there is a treaty with the Mysore Government and a Government Notification recognizing such a right (see *Bombay Government Gazette*, 26th November 1881, part I, p. 589). Suppose further that the defendants had won before the Mysore Court and the plaintiff thereafter filed another suit in British India on the same cause of action the defendants could have successfully pleaded *res judicata*, if so, why should not plaintiff rely on the same proceedings for purposes of limitation.

The principle of section 14 of the Limitation Act as explained in *Mathura Singh* v. *Bhawani Singh*[1] applies equally to proceedings before a foreign Court. The inclusion of such proceedings under section 14 would also seem to be in conformity with the principle laid down in *Sheth Kahandas* v. *Dahiabhai*[2]. *Cf.* Mitra on Limitation, p. 724.

Weldon, with *A. G. Desai*, for respondent:—

The expression "Court" in section 14 of the Limitation Act means a Court in British India. The word being a "general" word the ordinary rule of construction should be applied in construing its meaning, namely, that where a general word occurs in an Act in various places where its meaning must from the context be confined to a particular meaning then that word must be taken to be used everywhere in its particular or restricted meaning unless there is clear case made out to the contrary: *Blackwood* v. *The Queen*[3], *The Queen* v. *Blane*[4]. In the Limitation Act itself which can apply only to British India the expression occurs in over a dozen places where its meaning can only be "Court" in British India, *e. g.*, in this very section itself. Another argument in favour of this contention is based on the fact that Courts do not *ipso facto* recognise extra territorial Courts. For example, judgments and decrees of foreign Courts would not

(1) (1900) 22 All. [illegible]48, 25[illegible]. (3) (18[illegible]) 8 A. C. 82, [illegible]4.
(2) (18[illegible]) 3 Bom. 18[illegible]. (4) (18[illegible]) 13 Q. B. 76[illegible].

1910

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be recognised in British India save for express enactments in the Codes and Acts, *e g*, Civil Procedure Code, 1882, sections 13 and 229 B, see also *Bababhat* v *Narharbhat*(1)

CHANDAVARKAR, J —*The only question argued on this appeal* is one of limitation and it is whether the words "a Court of first instance" and "a Court of appeal", in section 14 of the Indian Limitation Act, include a foreign Court, such as one in a Native State falling within that description

The question has arisen under the following circumstances *The appellant brought a suit and obtained a decree against* the respondent in the Court of the District Judge of Shimoga in the Native State of Mysore On appeal to the Chief Court of that State, the decree was reversed and the suit dismissed, on the ground that the Court at Shimoga had no jurisdiction, as the cause of action had arisen in British India

The appellant *then filed this suit in* the Court of the First Class Subordinate Judge at Dharwar The suit was on the face of it barred by limitation but the appellant, relying on section 14 of the Limitation Act, claimed to exclude, from the period prescribed by that Act for the suit, the time during which he had been prosecuting with due diligence the civil proceeding in the Courts in the Mysore State

The Subordinate Judge has held that the word "Court" in that section means a Court in British India, and not a Court in a Native State

Mr Jayakar, appearing for the appellant, contends that as there is no definition of the word "Court" in the Limitation Act it must be construed in the wide sense in which it is used in that section so as to include "a foreign Court" and he relies on the judgment of Muttuswamy Iyer, J, in *Parry and Co* v *Appasami Pillai*(2) That judgment went up in appeal and was reversed on another ground, the appellate Court not thinking it necessary to decide the question arising under section 14 of the Limitation Act

All legislation is primarily territorial, and a limit must be placed upon the general sense of a word used in a statute with

(1) (1880) 13 Bom. 224 (2) (1880) 2 Mad 407 410

reference to that principle of law, unless there is something in the language or object of the statute which compels the Court to interpret the word in its wide sense, *Cooke* v *Charles A Vogeler Company*[1] As was said by this Court in *Shidlingapa* v *Karisbasapa*[2], "the words of a statute though to be given their grammatical sense, are to be construed also with reference to the general purpose of the statute" Following that canon of construction, our Court held in *Queen Empress* v *Bapuji Dayaram*[3], that the words "any Court", in section 258 of the Civil Procedure Code of 1882, meant only "any Civil Court"

Turning now to the Limitation Act, its preamble shows that the "Courts" to which it applies are Courts in British India not foreign Courts The word must be read in that restricted sense, or else the absurdity would follow that the Legislature intended to provide a "law relating to the limitation of suits, appeals and certain applications" for Courts outside its jurisdiction And if that is the restricted meaning of the word as used in the preamble, the same meaning must be attached to the word where it occurs in the enacting portions of the Act, unless the enactment is itself so clear and unambiguous as to show that the Legislature intended a departure from that meaning in the case of any particular section of the Act Neither expressly nor by necessary implication has the Legislature made any such purpose apparent in the Limitation Act The implication is rather the other way Section 11 of the Act relates to a "suit on foreign contracts", and Article 117 to Schedule I of the Act provides a period of limitation for a suit upon "a foreign judgment" Whenever, therefore, the Legislature intended anything relating to a foreign State to be brought in, it has provided for it by express language It is a fair inference from it that, had the Legislature intended to include a foreign Court in the word "Court" in section 14, it would have said so

In this connection we must examine the scheme of the Code of Civil Procedure with reference to foreign Courts, because that

(1) (1901) A C 10?
(2) (188?) 11 Bom 500, 601
(3) (1886) 10 Bom 28?

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CHIMATAPA CHENDASAPA v. ABDUL VAHAB

Act and the Limitation Act are in *pari materia*, both are laws of procedure The Code does not define the word "Court," and that for the obvious reason that it applies primarily to the Courts on whom the Code is binding But it defines "a foreign Court", and wherever it intended that any section of the Code should apply to any judgment or proceeding of that Court, it has said so in distinct terms, as, for instance, in sections 13 and 44

By section 13 of the Code, the judgment of a foreign Court is placed on the same footing as that of a Court to which the Code applies, not in all but only in some cases and for a certain purpose That judgment is conclusive as to any matter "directly adjudicated upon" but only upon certain conditions one of which is that it must be a judgment "given on the merits of the case" Where it is not so given the foreign Court is not recognised by the Code as being on the same footing with Courts in British India, to which the Code applies A judgment of a foreign Court dismissing a suit on the ground that it has no jurisdiction to try it, is not a judgment on the merits If a foreign Court which has dismissed a suit for want of jurisdiction, is not equivalent to a Court to which the Code applies, so far as its judgment dismissing the suit is concerned, it follows that the Legislature did not intend the word "Court" to include a foreign Court in cases to which such judgments relate

Again, by section 10 of the Code it is enacted that no Court shall try a suit, in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties where such suit is pending in the same or any other Court in British India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of British India established or continued by the Governor General in Council and having like jurisdiction, or before His Majesty in Council Then there is an "explanation" added that "the pendency of a suit in a foreign Court does not preclude the Courts in British India from trying a suit founded on the same cause of action" There was, strictly speaking, no necessity for this explanation, because the words of the section restrict its scope in plain language to Courts which exclude a foreign Court Therefore

the fact that it is added as an "explanation" to the section is important Had the Legislature intended the word "Court" to mean any Court, whether British Indian or foreign, it would have called that a *proviso* or an *exception* which it has called an "*explanation*" The explanation must, therefore, be regarded as having been added *ex majore cautela*, and it throws light on the intention of the Legislature that the word "Court" should not include a "foreign Court" unless it has that meaning given to it expressly or by necessary implication in the Code

Section 41 of the Indian Evidence Act, on which Mr Jayakar relies in support of his argument, relates to judgments *in rem*, which are judgments of all competent Courts, including foreign, in the exercise of probate, matrimonial, admiralty, or insolvency jurisdiction The word "competent Court" in that section includes a foreign Court, because of the well known rule of law that such judgments are of "ubiquitous authority and universally conclusive" (Story on the Conflict of Laws Ch XV, and Hukm Chand on *Res Judicata*, pp 603 to 606) This section in the Evidence Act supports the conclusion that the word "Court", occurring in a statute excludes a foreign Court, unless by express language or by necessary implication the statute includes it or some well known rule of law warrants the wider sense

For these reasons, we are of opinion that the word "Court" in section 14 of the Limitation Act does not include a foreign Court The decree must, therefore, be confirmed with costs

Decree confirmed

R R

APPELLATE CIVIL

Before Sir Basil Scott Kt, Chief Justice, and Mr Justice Batchelor

1910
July 22

MESSRS LADDHA EBRAHIM AND CO (ORIGINAL PLAINTIFF) APPELLANT, *v* THE ASSISTANT COLLECTOR, W D, POONA, AND ANOTHER (ORIGINAL DEFENDANT AND ADDED RESPONDENT) *

Land Acquisition Act (I of 1894) section 18—Hereditary Offices Act (Bom Act III of 1874) sections 10 and 13[1]*—Maharki Vatan land—Acquisition by Government—Award—Compensation—Title by adverse possession against Vatandars—Collector s certificate—Jurisdiction*

Certain land with buildings thereon having been acquired by Government under the Land Acquisition Act (I of 1894) the Assistant Collector passed an award whereby he awarded by way of compensations one sum to the owner of the buildings on the land and another to certain Mahar Vatandars on account of the land being Maharki Vatan The owner of the buildings having objected to the award the Assistant Collector at the instance of the objector referred the matter to the District Court under *section 18 of the Act*

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* Appeal No 2?0 of 1908

(1) Sections 10 and 13 of the Hereditary Offices Act (Bom Act III of 1874) are as follows —

10 When it shall appear to the Collector that by virtue of, or in execution of a decree or order of any British Court any watan or any part thereof, or any of the profits thereof recorded as such in the revenue records or registered under this Act and assigned under section 23 as remuneration of an officiator has or have after the date of this Act coming into force, passed or may pass without the sanction of Government into the ownership or beneficial possession of any person other than the officiator for the time being or that any such watan or any part thereof or any of the profits thereof not so assigned has or have so passed or may pass into the ownership or beneficial possession of any person not a watandar of the same watan the Court shall on receipt of a certificate under the hand and seal of the Collector stating that the property to which the decree or order relates is a watan or part of a watan or that such property constitutes the profits or part of the profits of a watan or is assigned as the remuneration of an officiator and is therefore inalienable remove any attachment or other process then pending against the said watan, or any part thereof, or any of the profits thereof and set aside any sale or order of sale or transfer thereof and shall cancel the decree or order complained of so far as it concerns the said watan or any part thereof or any of the profits thereof

13 Watan property assigned as remuneration of an officiator under section 23 and the profits of such watan property are not liable to process of any Civil Court

On receipt of a certificate under the hand and seal of a Collector to the effect that certain property designated therein is watan property so assigned the Court shall remove any attachment or other process placed on, or set aside any sale of or affecting such property or the profits thereof

The District Judge found that the obje tor ha l acquired title to the land by adverse possession and thus became entitl d to the compensat on on account of the land as against the Mahar claimants Subs quently the Collector forwarded to the District Court a certificate issued under s ction 10 of the Hereditary Offices &c (Bom Act III of 1874) that the order for the payment of the compensation to the objector shou d be set aside in accordance with the provi ions of sections 10 and 13 of the Act Thereupon the District Judge holding that he had no jurisdiction to decide whether the prop rty was Vatan or not in the face of the Collector s certific te cancelled his order

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I ADH... FURAH... & Co v ASSISTA... COLLECT... POONA

The objector having app ale l against the said order,

Held restoring the award of the District Court, that an award under the Land Acquisition Act (I of 1894) was not a decree or order capable of execution under the Civil Procedure Code (Act V of 1908) and was therefore not within the purview of sect on 10 of the Hereditary Offi es Act (Bom Act III of 1874)

Held further that th awar l of the District Court which was the cause of the certificate ma le it c ear that the Mahars property had been acquired by the objector by adverse possession b fore the commencement of the proceedings for the a quisition of the land by Gov rnment

Per curiam —Even if it could b said that there was any danger of the pa sing of the ownership by virtue or in execution of a decree or order in the Land Acquisition proceedings it could not be said that that result was arrived at without the sanction of Government who set the machinery of the Act in motion for the acquisition of the land

Nilkanth v *The Collector of Thana*(1) *Collector of Thana* v *Bhaskar Mahadev*(2), *Rachapa* v *Amingorda*(3) referred to

APPEAL from the decision of C A Kincaid, District Judge of Poona, in Reference No 18 of 1906, made by the Assistant Collector of Poona under section 18 of the Land Acquisition Act (I of 1894)

The facts were as follows —

The dispute was with respect to the ownership of Survey No 29 of Nisbat Manjre in the Poona Collectorate and the valuation of the buildings standing on the said land

In the year 1906 the Government of Bombay, wishing to acquire the said land for an extension to the Sassoon Hospital

(1) (189) 2. Bom 80   (2) (1884) 8 Bom 264
(3) (1881) 5 Bom 283

1910

LADDHA EBRAHIM & CO v. ASSISTANT COLLECTOR, POONA

at Poona, directed Mr Bolus, the First Assistant Collector of Poona, to take the action requisite under the Land Acquisition Act (I of 1894) On the 9th March 1906 Mr Bolus issued notices to all the persons interested in the property to appear before him to state their claims, and on the 17th March 1906 he awarded Messrs Laddha Ebrahim and Co Rs 10,777 for the buildings standing on the land and a sum of Rs 4,508 to certain Mahars who claimed to be Vatandars of the land The latter sum was invested in the Government Treasury to provide for the service allowances of the said Mahar Vatandar

Messrs Laddha Ebrahim and Co, being dissatisfied with the said award, moved the Assistant Collector to refer the matter to the District Court at Poona under section 18 of the Land Acquisition Act (I of 1894) The Reference was registered in the District Court as Suit No 13 of 1906

Messrs Laddha Ebrahim and Co contended *inter alia* that the Assistant Collector did not, at the time of making the award, make any inquiry as to whether the Mahars had any interest in the land, therefore, it was an error to award to them the compensation on the ground that the land was given to them for service, that the Company had become full owner of the land and thus extinguished the claim of the Mahars, that the Company were in enjoyment of the land as owner for more than twelve years and, lastly, that the land and the buildings had been undervalued, the value of the entire property being Rs 45,000

The District Judge found (1) that the land was Maharki Vatan, but had become by prescription the property of Messrs Laddha Ebrahim and Co and the Court had jurisdiction to hear the case, (2) that Messrs Laddha Ebrahim and Co had acquired full ownership of the land, and (3) that the Mahars' title, if any, had been extinguished by twelve years' adverse possession

As regards the compensation for the land and the buildings, the award of the Assistant Collector was confirmed by the District Judge, who made no order with respect to the costs of Messrs Laddha Ebrahim and Co "in view of the extravagance

of their demand" The District Judge pronounced his decree on the 22nd August 1907

Messrs Laddha Ebrahim and Co preferred an appeal, No 15 of 1908, to the High Court In this appeal the Company contested the amount of the compensation, and it claimed Rs 2,816 in addition to that awarded by the District Judge

After the District Judge had passed his decree on the 22nd August 1907, the Collector of Poona, on the 23rd November 1907, forwarded to the District Judge the following certificate —

"CERTIFICATE

Whereas the property hereinbelow described namely —

Village	Survey No	Area	Assessment
		A g a	Rs a p
Nisbut Manjiri	Part of Survey No 29	2 18 0	4 8 0

forms part of a Mahar Vatan and has been recorded as such in the revenue records and has been assigned as remuneration of the officiators for the time being under section 23 of Bombay Act III of 1874 and is therefore inalienable without the sanction of Government under section 7 of the said Act And whereas the said land has been acquired by Government under the Land Acquisition Act and compensation amounting to Rs 1508 has been awarded therefor And whereas it appears to me G Carmichael Collector of Poona that the said compensation which now represents or is part of the said Vatan property or the profits thereof may pass without the sanction of Government into the ownership of a person or persons other than the officiator for the time being by virtue of an order passed by the Court of the District Judge Poona in Civil Suit No 13 of 1906 declaring Messrs Laddha Ebrahim and Co to be entitled to the payment of the said compensation

Now therefore I, G Carmichael, Collector of Poona hereby certify to the Court of the District Judge Poona that the said property is Vatan property recorded as signed inalienable and not liable to process or order of any Civil Court as aforesaid in order to the setting aside of the order for the payment of the said compensation in accordance with the provisions of sections 10 and 13 of the said Act

Poona dated this 23rd day of November 1907

(Signed) G CARMICHAEL
Collector of Poona"

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LADDHA EBRAHIM & Co v. ASSISTANT COLLECTOR, POONA

On receipt of the said certificate the District Judge sent for the parties and after hearing them passed the following order on the 27th July 1908 —

Such a certificate has now reached me concerning the compensation money for the land in Civil Suit No 13 of 1906 I therefore cancel my former order in which I directed the said compensation money to be paid to Messrs Laddha Ebrahim and Co

Messrs Laddha Ebrahim and Co preferred an appeal, No 220 of 1908 which was heard by Scott, C J, and Batchelor, J

Branson with *D A Khare* for the appellant (plaintiff, Messrs Laddha Ebrahim and Co)

G S Rao (Government Pleader) for the respondents (defendants, Assistant Collector, and Collector)

SCOTT, C J —In the year 1906 the Government of Bombay took action to acquire by the machinery of the Land Acquisition Act 1894, part of Survey No 29 of Nisbat Manjre in the Poona Collectorate with the buildings thereon

The land, the subject of the acquisition was registered in the Revenue Records as Maharki Vatan It was in the occupation of Messrs Laddha Ebrahim and Co, to whom the buildings erected upon it admittedly belonged

On the 19th of March the Assistant Collector passed an award whereby he awarded to Messrs Laddha Ebrahim and Co for the buildings Rs 10,777 and to the Mahars collectively, who claimed to be interested as Vatandars, Rs 4,508 for the land He *directed that the latter sum should be credited in the Government* Treasury in the names of the Mahar claimants and that the interest accruing thereon should be paid to them by the Mamlatdar There is nothing to indicate that this was under any arrangement come to with the Mahar claimants under clause (4) of section 31 of the Land Acquisition Act but for the purposes of this judgment we will assume that these directions were not *ultra vires*

The award was not accepted by Messrs Laddha Ebrahim and Co and the Assistant Collector accordingly as required by them, referred the matter to the Court under section 18 of the Act

1910

LADDHA EBRAHIM & Co v. ASSISTANT COLLECTOR, POONA

The objections of Messrs Laddha Ebrahim and Co were both s to the amount of the compensation and the persons to whom was payable Under the latter head the objectors claimed ne whole of the compensation for the Maharki land on the round that they had acquired it by adverse possession This aim was decided in their favour by the award of the Court elivered on the 22nd of August 1907 Messrs Laddha Ebrahim nd Co thus became entitled as against the Mahar claimants to ne compensation money Rs 4 508 On the 23rd of November 907, however, the Collector of Poona forwarded to the Court of ne District Judge a certificate purporting to be issued under ection 10 of the Vatan Act in order that the 'order for the ayment' of the compensation amounting to Rs 4,508 to Messrs addha Ebrahim and Co might be set aside 'in accordance with ne provisions of sections 10 and 13' of Bombay Act III of 874 The District Judge holding that the Court had no urisdiction to decide whether property is Vatan or not in face f the Collector's certificate cancelled his former order directing he compensation money to be paid to Messrs Laddha Ebrahim nd Co

From this decision Messrs Laddha Ebrahim and Co appeal ontending that the Collector's certificate was issued without urisdiction and is of no effect

Section 10 of the Vatan Act of 1874 empowers the Collector o issue a certificate when it appears to him that by virtue of r in execution of a decree or order any Vatan property has assed or may pass without the sanction of Government into he ownership or beneficial possession of any stranger to the Vatan

In considering whether the action of the Collector in the resent case was within his powers various questions arise

Is there a decree or order in this case such as is contemplated y the section if so has any property passed or can it onceivably pass by virtue or in execution of such decree or rder and if so has it passed or may it pass without the anction of Government?

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LADDHA EBRAHIM & Co v. ASSISTANT COLLECTOR POONA

With regard to the first question we think the reasoning of the majority of the Court in *Nilkanth* v *Collector of Thana* [1] sufficiently establishes that an award under the Land Acquisition Act of 1894 is not a decree or order capable of execution under the Civil Procedure Code and is therefore not within the purview of the section As regards the second question the award of the Court which was the cause of the certificate made it quite clear that the Mahars' property had been acquired by Messrs Laddha Ebrahim and Co by adverse possession before the commencement of the proceedings for the acquisition of the land by Government under the Land Acquisition Act

The Collector is called upon to make some inquiry before issuing his certificate "and thus exercising a judicial function is subject to control by this Court, should he make his authority a mere cloak for illegal and wholly unreasonable proceedings" See *The Collector of Thana* v *Bhaskar Mahadev Sheth*[2] It could not appear to the Collector if he had perused the award of the Court which he wished to have set aside that Messrs Laddha Ebrahim and Co were in ownership of the land at the date of its acquisition by Government otherwise than by adverse possession Even if it could be said that there was any danger of the passing of the ownership by virtue or in execution of a decree or order in the Land Acquisition proceedings it could not be said that that result was arrived at without the sanction of Government who set the machinery of the Act in motion for the acquisition of the land

Moreover, it has been said by a Full Bench of this Court in *Rachapa* v *Amingoida*[3] that it cannot be supposed that the "Bombay Legislature had any such purpose in its contemplation, when enacting section 10 of the Act, as to take advantage of the errors of the Civil Courts by maintaining a possession obtained by their wrongful operation, or to interfere with the jurisdiction of the High Court to reverse and prevent the execution of erroneous decrees of Courts subordinate to it" Yet, if we allowed the Collector to intervene and say as in effect he does

(1) (1897) 22 Bom 802 (2) (1884) 8 Bom 264 at 268
(3) (1880) 5 Bom 283 at 293

"I wish the award of the Assistant Collector to stand and that of the Court on the reference under section 18 to be set aside," we should be crediting the Legislature with such an intention

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LADDHA EBRAHIM & Co v. ASSISTANT COLLECTOR POONA

For these reasons we restore the award of the Court and direct the District Judge not to act on the certificate of the Collector

The Government must pay the costs of the appellant

Laddha Ebrahim and Co's Appeal No 15 of 1908, as to the amount of compensation, is dismissed with costs

Award of the District Court restored

G B R

APPELLATE CIVIL

Before Mr Justice Chandavarkar and Mr Justice Heaton

SAKRAPPA BIN LINGAPPA HEBSUR (ORIGINAL DEFENDANT NO 1) APPELLANT, v SHIVAPPA *alias* ISHWARAPPA BIN BASAPPA AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS NOS 2 3 4) RESPONDENTS *

1910 *August 29*

*Arbitration—Award—*Boná fide *mistake of law committed by arbitrator—Minor party receiving a smaller share—Award binding upon the minor*

The arbitrators to whom a dispute was referred by parties, one of whom was a minor took *boná fide* an erroneous view of law and ordered an unequal division of the property in dispute awarding the smaller share to the minor The lower Court set aside the award on the grounds that the arbitrators had taken an erroneous view of the law and that as the minor had received a smaller share under the award it was not to his benefit and therefore not binding upon him —

Held, that the award was valid and binding upon the minor The validity of the award must be determined according to the circumstances as they existed at its date, and not by what transpired some years after it had been passed by the arbitrators

Rajunder Narain Rae v *Bijai Govind Singh*(1), followed

SECOND appeal from the decision of T D Fry, District Judge of Dharwar, confirming the decree passed by T V Kalsulkar, Subordinate Judge at Hubli

* Second Appeal No 290 of 1909

(1) (1839) 2 M I A 181, 219 231

1910

SAKRAPPA BIN LINGAPPA HUBSUR v. SHIVAPPA.

Suit to recover possession of property.

The property in dispute originally belonged to one Neelappa, who had a brother Ningappa (father of Sakrappa, defendant No. 1). Neelappa died leaving him surviving his widow Gangawa and three daughters: Chanvirawa, Basawa and Somawa. Both Chanvirawa and Basawa died before Gangawa, the former leaving no issue, but the latter leaving behind her a son Shivappa (the plaintiff).

Gangawa died on the 11th September 1903, and Somawa died the next day.

At Somawa's death, disputes arose between Shivappa (plaintiff) and Sakrappa (defendant No. 1) as to the property left by her. Shivappa was represented by his father as his guardian. The disputes were referred to the arbitration of two persons, who being of the opinion that Sakrappa was the heir to the property, made an unequal division of the property, giving to the minor Shivappa, the smaller share.

Later on, Shivappa filed a suit against Sakrappa to recover possession of the whole of the property belonging to Somawa, alleging that he was the preferential heir.

Sakrappa (defendant No. 1) relied on the award as barring the suit.

The Subordinate Judge decreed the plaintiff's suit. He held that the plaintiff was the preferential heir to Somawa's estate and that the award was not binding upon him.

This decree was on appeal confirmed by the District Judge.

Jayakar (with him *Nilkant Atmaram*), for the appellant (defendant No. 1):—

It has been found that there was reference to arbitration and that there was no fraud or collusion. But the lower appellate Court has set aside the award on the ground that it was not for the minor plaintiff's benefit. The Court so held, for it found that the arbitrators had taken a mistaken view of the law and had awarded to the plaintiff much less than what he was entitled to. The following cases were referred to: *Balaji* v. *Nana*[1],

[1] (1903) 27 Bom. 287.

Subba Reddi v *Kotamma*[1], *Mala Reddi* v *Ashvaratha Reddi*[2], and *Bhaurao* v *Radhabai*[3]

Branson (with him *D A Khare*), for the respondent (plaintiff) —

We say that the award is a fraud upon the minor The Subordinate Judge found that there was no reference to arbitrators and no award by them It has also found that the partition deed executed in consequence of the alleged award was fraudulent The District Judge has also recorded findings to the same effect

CHANDAVARKAR, J —The appellant must succeed upon the point argued in the second appeal as to the validity of the award The learned District Judge has found that there was no *mala fides* in the reference to the arbitration, but he holds that the award made by the arbitrators does not bind the first respondent (plaintiff), because of the inequality of the benefit he derived from it and the erroneous view of the difficult point of Hindu law, which led the arbitrators to make the award In other words, the learned Judge has declined to treat the award as valid, not because of the circumstances as they existed at its date, but by what transpired some years after it had been passed by the arbitrators That, however, is not the test by which the validity of an award is to be determined The law applicable to this case is very clearly laid down by the Privy Council in *Rajunder Narain Rae* v *Bijai Govind Singh*[4], where their Lordships say, dealing with the compromise there in dispute —"To judge properly of the objection whether the compromise is valid or not, we must look at the circumstances as they stood at the time when the *solehnamah* was executed The appellants are not entitled to avail themselves of all the light which subsequent investigation in the course of the suit has thrown upon their claim If the nature or the extent of the rights of the respective parties could be considered as the fair subject of doubt at the time of the deed, and if, to avoid expense and delay by legal inquiry, they agreed to settle the contest by an amicable arrangement, such transaction is not to be disturbed on the

(1) (1904) 14 M L J P 442
(2) (1905) 15 M L J P 404
(3) (1906) 33 Bom 401
(4) (1839) 2 M I A 181 at p 251

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SAKRAPPA BIN LINGAPPA HEBSUR v SHIVAPPA

ground of the inequality of benefit which either party may eventually have received from it" Having dealt with the question from that point of view, their Lordships go on to say —"Under all these circumstances, the true amount of the relative rights of the litigant parties must be considered as having been doubtful, whether the law or the fact be regarded" And merely because the view which the arbitrators took of the law differs from that which a Court would take after a more careful investigation of the rights of the parties, it cannot be said that the agreement when it was entered into was not a fair subject of compromise of disputed and doubtful rights

As the present case falls within the principle above quoted, the decree of the learned District Judge must be reversed and the suit dismissed with costs throughout upon the respondents

Decree reversed

R R

APPELLATE CIVIL

Before Mr Justice Batchelor and Mr Justice Rao

1910
October 4

DASSA RAMCHANDRA PRABHU (ORIGINAL PLAINTIFF) APPELLANT v NARSINHA AND ANOTHER (SONS AND HEIRS OF ORIGINAL DEFENDANT 1), RESPONDENTS *

Gift burdened with an obligation—Alienation by donee—Restrictions on alienation

When it is doubtful, whether a deed embodies a complete dedication of property to a religious trust or merely creates a gift of that property subject to an obligation to perform certain services the question should be decided by reference to the deed itself In the former case the property would be inalienable and in the latter alienable subject to the obligation, and notwithstanding restrictions as to selling or mortgaging the said property

APPEAL under section 15 of the Letters Patent against the decision of Scott, C J, in Second Appeal No 355 of 1908

Suit for a declaration that the property in question was not liable to sale in execution of a decree

* Appeal No 14 of 1909 under the Letters Patent

The lands in dispute along with other property belonged to one Wette Prabhu bin Krishna Prabhu He had five sons, namely Raya *alias* Ramchandra Prabhu, Vithoba Prabhu, Bhiku Prabhu, Hari Prabhu and Appa Prabhu On the 13th February 1890 he effected a partition of his immoveable property between himself and his sons, reserving one share to himself and giving one to each of his five sons The following is the material portion of the deed of partition (exhibit 59) —

These plots the income whereof has been settled to be 10½ khandies of rice and 2,?00 cocoanuts should from this day be enjoyed by Vithoba Prabhu who should from the current year 1899 pay to Government the assessment Rs 11 8 0 and local fund cess Re 0 14 6 in respect of the same and hand over to me the (following) profit namely 8½ khandies of rice, Rs 17 in cash and 920 cocoanuts in my life time I am to maintain the divine services mentioned above with the (help of the) same Vithoba Prabhu should take these profits after me and perform the said divine services on the respective occasions by inviting all his brothers and in the same manner as hitherto on the day of this *Samaradhan* the *Santarpan* (rite) should be performed each of the brothers giving whatever help he can (in respect of the same) Should Vithoba Prabhu be at any time unable to conduct the divine services, such of the other brothers as might be willing, may take the said profits from Vithoba Prabhu and perform the services Some money has to be spent on plot Survey No 42 Should Vithoba Prabhu spend it and get the land improved and raise extra produce none can claim (from him) either that more should be spent for divine services than what has been now settled nor that (any) profits are due (to him i e, one of them) Vithoba Prabhu has no right whatever to convey these plots either by mortgage, sale or mulgeni Every sharer should bring and give two Hingari (betel nut flower) branches for the purposes of *Anant Vrita* (festival) Should they be unwilling to regularly perform this festival *in the family* and the same be *made over to a mutt, &c, all brothers should* equally contribute towards the 1½ khandies of rice Rs 8 in cash and .0 cocoanuts settled in respect of it Should the assessment of these lands be increased or diminished in the Revision Survey Vithoba Prabhu should bear the same and hold these lands upon those conditions from generation to generation But he must not allow the plots to deteriorate Should Vithoba Prabhu think that he does not want them, he may give them into the possession of such of the other brothers as might be willing to whom these very conditions would then apply

Subsequently one Damodar Shrinivas Bhatta obtained a decree against Vithoba Prabhu and the lands in dispute were attached in the execution proceedings Raya *alias* Ramchandra Prabhu,

1910

DASSA RAMCHANDRA PRABHU v NARSINHA

alleging himself to be the purchaser of Vithoba Prabhu's interest, applied for the removal of the attachment but his application was dismissed He, therefore, brought the present suit against Damodar Shrinivas Bhatta, as defendant 1, and his brothers, as defendants 2 5 for a declaration that the property in suit was not liable to attachment in execution of the decree obtained by defendant 1 against defendant 2, Vithoba Prabhu The plaint alleged that the property was reserved by the family of the plaintiff and defendants 2 5 for the performance of certain religious observances or ceremonies, they were, therefore, not alienable to outsiders and could not be sold in execution

Defendant 1 answered *inter alia* that the property was liable to be sold subject to the performance of certain religious observances and that it was not a trust property

Defendant 2, Vithoba Prabhu, was absent

Defendant 3, Bhiku Prabhu, answered that the property was kept with defendant 2 but he failed to perform the religious observances therefore, the property was made over to the plaintiff, and that it was not liable to be sold to an outsider

Defendant 4, Bapu Prabhu, put in a similar defence

The Subordinate Jude of Honavar found that the transfer by defendant 2 of his interest to plaintiff was fraudulent, that the property was liable to sale subject to the costs of religious performances and that it was not a trust property He, therefore, dismissed the suit

On appeal by the plaintiff the District Judge of Karwar found that the arrangement evidenced by the deed of partition, exhibit 59, was a good trust, therefore, the property was not liable to sale and that the transfer by defendant 2 was not fraudulent and without consideration He, therefore, reversed the decree and awarded the claim

Defendant 1 preferred a second appeal, No 355 of 1908

Nilkanth A Shireshkarkar for the appellant (defendant 1)

P M Vinekar for the respondent (plaintiff)

The second appeal was heard by Scott, C J, and his Lordship delivered the following judgment on the 12th February 1909 —

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DASSA RAMCHANDRA PRABHU v. NARSINHA.

SCOTT, C J —The question in this case is whether the plaintiff is entitled to a declaration that the property in suit is not liable to attachment and sale in execution of the decree obtained by the 1st defendant against the 2nd defendant

The District Judge has held that no portion of the corpus of the estate can be applied in satisfaction of the decree obtained by the defendant That decision is based upon the assumption that the case is governed by the decision of the Privy Council in *Bishen Chand Baswat* v *Nadir Hossein*[1]

The material facts relating to this property are that it was, on the occasion of the partition between the owner and his sons, assigned to one of the sons named Vithoba and it was provided that out of the yearly produce which then amounted to 10½ khandies of rice and 2,200 cocoanuts, 8½ khandies, Rs 17 in cash and 920 cocoanuts should during his life time be given to the father for the maintenance of certain religious services, and that after his death those religious services should be performed by Vithoba, but Vithoba was to be at liberty to improve the property and raise extra produce without anyone having any claim upon him for such extra produce, and if the assessment was raised or diminished, he was to bear the burden or reap the benefit of that rise or diminution From this it appears that the expenditure upon the religious ceremonies was to be defrayed by a charge upon this particular property and that subject to that the produce was to be for the benefit of Vithoba

In the case in *Bishen Chand Basawat* v *Nadir Hossein*[1] to which I have above referred the facts were different There the whole of certain property was assigned to a person as trustee He was to be allowed to draw a trustee's monthly wage of Rs 40, and the whole of the yearly profits of the estate were to be expended by him in the manner provided by the trust deed It was held by the Judicial Committee in that case that the corpus so dedicated in trust could not be sold in execution of trustee's debt although it might be as suggested by the High Court that the emoluments of the trustees might be attached and sold in execution This distinguishes the case altogether from

(1) (1887) 15 Cal. 329

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that now before me The cases cited by Mr Nilkanth, *Basoo Dhul* v *Kishen Chander Geer Gossain*[1] and *Futtoo Bibee* v *Bhurrut Lall Bhukut*[2] are more in point The head note of the first case is as follows —"A property wholly dedicated to religious purposes cannot be sold, but where a portion only of its profits is charged for such purposes the property may be sold subject to the charge with which it is burdened"

The decree of the District Judge must be set aside and that of the Subordinate Judge restored, and this appeal allowed with costs in this Court and in the lower appellate Court

Against the above decision the plaintiff appealed under section 15 of the Letters Patent and the appeal was heard by Batchelor and Rao, JJ

D A Khare, P M Vinekar and *P N Pandit* for the appellant (plaintiff) —

The deed of partition, if properly construed, will show that no attachable interest was left in Vithoba There was a complete dedication of the property to the family idol The deed left some little profit to be enjoyed by Vithoba but that circumstance would not detract from the character of the dedication as a complete trust The extra income was left to Vithoba as remuneration for his trouble The present case is similar to that of *Rupa Jagshet* v *Krishnaji Govind*[3] See also *Bishen Chand Basawat* v *Nadir Hossein*[4]

Nilkanth A Shiveshwarkar for the respondents (defendants) —

Reading the partition deed through, it will appear that there was no dedication to the family idol There are several passages in the deed which make this circumstance clear Whoever may be the person holding the lands, he will hold them burdened with that specific charge The cases relied on are distinguishable In *Bishen Chand Basawat* v *Nadir Hossein*[4] there was a complete trust and in *Rupa Jagshet* v *Krishnaji Govind*[3] the question was whether a particular endowment was a religious endowment

(1) (1869) 13 W R 200
(2) (1868) 10 W R 299
(3) (1881) 9 Bom 169 at 171
(4) (1887) 15 Cal 329

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DASSA RAMCHANDRA PRABHU v. NARSINHA

BATCHELOR, J —This was a suit in which the plaintiff prayed for a declaration that the property in question was not liable to attachment and sale in execution of a decree obtained by the 1st defendant against the 2nd defendant inasmuch as it was property reserved for the performance of a certain religious trust

The learned Subordinate Judge in the Court of first instance dismissed the suit holding that the document relied upon as constituting the trust did not constitute a trust but showed that there was here only a gift burdened with an obligation

In the Court of appeal however the learned District Judge took another view, and was of opinion that there was a good complete trust of the property which in consequence was not liable to attachment and sale

Against the District Judge's decree an appeal was presented to this Court, it was heard and decided by the Chief Justice who accepted the Subordinate Judge's view of the case as correct and restored his decree reversing that of the District Judge

Now finally from the Chief Justice's decree an appeal is made to us

The case at first sight may present some little difficulty in determining which side of the line it ought to be considered to fall, but now that it has been fully argued on both sides, we are unable to entertain any doubt whatever but that the correct view is that which was taken by the Chief Justice The controversy turns upon the meaning of the partition deed exhibit 59 Is there by that deed a complete dedication of this property to a religious trust or is there merely a gift to Vithoba of the property subject to an obligation to perform certain services? If there was a complete dedication, then admittedly the property is not liable to attachment If there was merely a gift burdened with an obligation, then an attachable interest was admittedly left in Vithoba The cases illustrating the two extremes are *Bishen Chand Basawat* v *Nadir Hossein*[1] and *Basoo Dhul* v *Kishen Chunder Geer*[2] The question really is

(1) (1887) 15 Cal 329 (2) (1869) 13 W R 200

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where, between these extreme points, does this case fall, and the way to ascertain that is we think, to look to the deed itself It is a deed to which the whole family were apparently parties, and it sets out in tabular form the details of the divine service to be performed annually in the household and the particulars of the expenses required for maintaining them The total of these expenses comes to 8½ khandies of rice, Rs 17 in cash and 921 cocoanuts

Thereafter the deed goes on, "These plots the income whereof has been settled to be 10½ khandies of rice and 2,200 cocoanuts should from this date be enjoyed by Vithoba Prabhu who should from the current year 1899 pay to Government the assessment Rs 14 8 0 and local fund cess Re 0 14 6 in respect of the same and hand over to me the following profits, namely, 8½ khandies of rice, Rs 17 in cash and 920 cocoanuts in my life time I am to maintain the divine services mentioned above with the help of the same Vithoba Prabhu should take these profits after me, (that is after my death), and perform the said divine services on the respective occasions

Now pausing there we see that what is given is given to Vithoba Prabhu and consists of 10½ khandies of rice and 2,200 cocoanuts But out of this entire gift a reservation is made of part, and the reservation is imposed as a burden or obligation upon the donee But after the discharge of the burden so imposed, the donee is left in beneficial enjoyment of considerable property which works out at Rs 50 or upwards

Then another clause in the deed recites "some money has to be spent on plot Survey No 42 Should Vithoba Prabhu spend it and get the land improved and raise extra produce, none can claim from him either that more should be spent for the divine services than what has been now settled or that any profits are due to him (the claimant)" Again in a later clause it is provided, "should the assessment of these lands be increased or diminished in the Revision Survey, Vithoba Prabhu should bear the same and hold these lands upon these conditions from generation to generation" That is to say, whatever increase in the profits Vithoba can secure by prudent cultivation

goes not to the endowment but into his own pocket, and any increase or decrease in the Government assessment is in the same way to damnify or to benefit Vithoba personally and not the endowment

It seems to us clear from the particular words in this deed that all that is given to the endowment is that specific amount 8½ khandies of rice, Rs 17 in cash and 920 cocoanuts which is expressly stated in more than one passage and that endowment is merely a burden placed upon the larger gift which is made to Vithoba If we are right in thinking that that is the meaning of the deed considered as a whole, our opinion need not be shaken by the clause in which it is sought to prohibit Vithoba Prabhu from mortgaging or selling the lands in question For that clause would merely be an attempt to impose restrictions repugnant to the gift such as are frequently made in such documents and would be of no avail

For these reasons we are of opinion that the decree already made by this Court is the right decree

We affirm it and dismiss this appeal with costs

Appeal dismissed

G B R

CRIMINAL REVISION

Before Mr Justice Batchelor and Mr Justice Rao

IN RE BAI PARVATI *

1910
September 23

Criminal Procedure Code (Act V of 1898) section 209—Magistrate—Inquiry—The case not committed to the Court of Session for want of sufficient grounds—Appeal against the order—Order reversed by the Sessions Judge—Commitment when to be made—Discharge of accused

Where a Committing Magistrate finds that there is no evidence whatever or that the evidence tendered for the prosecution is totally unworthy of credit, it is his duty under section 209 of the Criminal Procedure Code (Act V of 1898) to discharge the accused

* Criminal Revision No. 182 of 1910

1910

In re Bai Parvati

Where the Magistrate entertains any real doubt as to the weight or quality of the evidence, the task of resolving that doubt and assessing the evidence should be left to the Court of Session

Emperor v *Ravji Hari Yelgaumkar*(1), followed

Queen Empress v *Namdev Satvaji*(2), distinguished

Lachman v *Juala*(3), approved.

THIS was an application, under section 435 of the Criminal Procedure Code (Act V of 1898), to revise an order passed by R E A Elliott, Additional Sessions Judge of Ahmedabad, reversing an order passed by G R Dabholkar, Resident Magistrate of Borsad

One Bai Jadav instituted a complaint against Bai Parvati (the applicant) in the Court of the Resident Magistrate of Borsad charging the latter with an offence punishable under section 307 of the Indian Penal Code (Act XLV of 1860)

The Magistrate heard the evidence tendered by the prosecution and disbelieving it declined to commit the accused to the Court of Session and discharged her under section 209 of the Criminal Procedure Code

The complainant appealed against this order to the Additional Sessions Judge of Ahmedabad who reversed the order passed by the Magistrate, and ordered him to draw up a charge against the accused and commit her for trial under section 307 of the Indian Penal Code

The accused applied to the High Court

Branson, with *Manmukhram K Mehta*, for the applicant —

Where a Committing Magistrate wholly disbelieves the evidence tendered on behalf of prosecution, it is his duty to discharge the accused under section 209 of the Criminal Procedure Code See *Lachman* v *Juala*(3), *In re the petition of Kalyan Singh*(4), *Queen-Empress* v *Munisami*(5), *Emperor* v *Ravji Hari Yelgaumkar*(1)

(1) (1907) 9 Bom L R 225

(2) (1887) 11 Bom 372

(3) (1882) 5 All 161

(4) (1889) 11 All 26

(5) (1891) 15 Mad 39

The decision of Mr Justice West in *Queen Empress v Namdev Salvaji*[1] may at first sight appear against our contention It only decides that a Magistrate should commit a case to the Court of Session when credible witnesses make statements which, if believed, would sustain a conviction The learned Judge has himself explained the case in *Dhanjibhai v Pyarji*[2]

R W Desai, for the Crown —

The question here is not whether the Magistrate had power to discharge the accused under sections 209 210 of the Criminal Procedure Code, but whether the Sessions Judge committed any error of law in directing a committal which would justify any interference by this Court with the order which has been passed by him under section 436 of the Criminal Procedure Code The Sessions Judge is a Judge of fact, whether the evidence adduced is or is not sufficient to warrant a committal With his finding this Court will not interfere See *Fattu v Fattu*[3] and *Emperor v Varjivandas*[4]

As to the cases relied on by the other sides the case of *Lachman v Juala*[5] was decided under the Criminal Procedure Code of 1872 and does not apply In *Dhanjibhai v Pyarji*[2], the Magistrate who had committed the accused had himself jurisdiction to try all the charges except one with which the accused was charged In the other cases the High Court was requested to interfere with the order of discharge or to direct a retrial or committal

BATCHELOR, J —This is an application by one Bai Parvati who was accused before the Magistrate of having attempted to commit murder by pushing another woman named Jadav into a well

Parvati the applicant was the mistress of Jadav's husband A good deal of evidence was summoned for the prosecution and the Magistrate having heard all the evidence tendered came to the conclusion which he expressed in these words "After having closely gone through the evidence as a whole I find that

(1) (1887) 11 Bom 372

(2) (1884) Ratanlal's Unrep Cr C 201

(3) (1904) 26 All 564

(4) (1902) 27 Bom 84 88

(5) (1882) 5 All 161

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In re Bai Parvati

it will be a mere waste of the Sessions Court's very valuable time if I commit the accused to it to take her trial there when I myself see that there are not sufficient grounds for committing her I, therefore, discharge her under section 209 of the Criminal Procedure Code"

From this order an application was preferred by Jadav to the Sessions Judge who, reversing the Magistrate's order, directed the Magistrate to draw up a charge against the accused Parvati and commit her for trial under section 307 of the Indian Penal Code

The question before us now is whether this order of the Sessions Judge should be sustained

Upon the facts underlying this application it is not necessary to say more than this that the First Class Magistrate went into them at some length, that he examined the evidence of the witnesses with great care and in the end found that there were no grounds to commit

The Sessions Judge, as we read his Judgment, does not materially dissent from the Magistrate in this view of the effect of the evidence tendered He says that "on a small foundation of probabilities an enormous superstructure of untruth has been gradually built up" and he proceeds to show that most of the important witnesses are totally unworthy of credit But having thus disposed of the witnesses, he says that there still remains the story of Bai Jadav herself, though at the same time he admits that "having regard to the relation between the two women it is improbable that Bai Parvati should have been allowed to accompany Bai Jadav to the well"

Upon the Sessions Judge's own estimate of the value of the evidence we think that the Magistrate was within his rights in ordering the discharge of Bai Parvati and that she should not be exposed to the expense and harassment of a Sessions trial which is practically foredoomed to failure No doubt in a case of this kind the line between the Magistrate's duty and the Sessions Court's prerogative is not easy to draw We think, however, that it is not difficult to show that in this case the Magistrate did not exceed his authority

The point before us was considered by Mr Justice Mahmood in *In the matter of the petition of Lachman* v *Jaula*[1] where the learned Judge after pointing out that the object of these provisions of law is to save the subject from the prolonged anxiety of undergoing trials for offences not brought home to them and also to save the time of the Court of Session from being wasted over unsuitable cases, goes on to say "I am of opinion that the power given to Magistrates under section 195 extends to weighing of evidence, and the expression 'sufficient grounds' must be understood in a wide sense I must not, however, be understood to lay down that this discretionary power should be exercised by the Magistrate without due caution or that he should take upon himself to discharge the accused in Sessions cases in the face of evidence which might justify a conviction But when the evidence against the accused is such that, in the opinion of the Magistrate, it cannot possibly justify a conviction I hold that there is nothing in the law which prohibits the discharge of the accused, even though the evidence against him consists of witnesses who state themselves to be eye witnesses, but whom the Magistrate entirely discredits' This construction commends itself to us as an accurate statement of the meaning of section 209 of the Criminal Procedure Code Nor do we think that there is anything in it which is in real conflict with what Mr Justice West said in the case relied upon by the respondent, *Queen-Empress* v *Namdev Satvaji*[2] For, the operation of that decision is limited to this that the Magistrate ought to commit when the evidence is enough to put the party on his trial and "such a case obviously arises when credible witnesses make statements which, if believed would sustain a conviction' It seems to us that the whole point of this passage lies in attaching due emphasis to the word 'credible' and some confirmation of that construction of the decision may be obtained from the observations of the same learned Judge in *Dhanjibhai* v *Pyarji*[3]

Apart also from authority it seems to us that the words of the section themselves leave little room for ambiguity The

(1) (1882) 5 All 161 (2) (1887) 11 Bom 372
(3) (1884) Ratanlal's Unrep. Cr C. 201

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section provides that if a Magistrate finds that there are not sufficient grounds for committing the accused person for trial he shall discharge him It is not merely therefore that the Magistrate in the case put is empowered to discharge the accused, he is bound to do so What then is the case put? It is the case where the Magistrate finds that there are no sufficient grounds for committing the accused person for trial He may so find either because there is no evidence whatever or because the evidence tendered for the prosecution appears to him to be totally unworthy of credit But in this latter case, equally with the former case, it would be his duty under the section to discharge the accused since the grounds relied on for a commitment would, in his opinion, be insufficient That is the construction which the word of the section suggest to us and which we understand was accepted by this Court in *Emperor* v *Raiji Hari Belgaumkar*(1) It is perhaps unnecessary to add that where the Magistrate entertains any real doubt as the weight or quality of the evidence the task of resolving that doubt and assessing the evidence should be left to the Court of Session, but that is not the case before us now

For these reasons, therefore, we must set aside the order of the Sessions Judge and restore that of the Magistrate

Order set aside

I R

(1) (1907) 9 Bom L R 2.5

APPELLATE CIVIL.

Before Mr Justice Chandavarkar and Mr Justice Heaton

SHRI SITARAM PANDIT *alias* BAPU MAHARAJ (ORIGINAL DEFENDANT) APPELLANT, *v* SHRI HARIHAR PANDIT *alias* BHAU MAHARAJ AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS * 1910 *August* 9

Hindu Law—Adoption—Payment of money to adoptive widow by way of inducement to her to adopt a particular boy—Payment is a bribe—Gift by adoptee in consideration of sum paid by his natural father—Gift invalid—Revocation of gift

C the natural father of N paid a sum of Rs 8 000 to B, a widow, as an inducement to her to adopt N After the adoption B conveyed by way of gift to C some lands at Chinchwad and got them transferred to his name Later on N conveyed in gift the lands in dispute which formed part of the property belonging to his adoptive father to his natural brother (the defendant) in consideration of the payment of Rs 8 000 made by C to B in exchange for the lands at Chinchwad and also having regard to the benefit he had derived from his adoption After the death of N, his sons (the plaintiffs) challenged the gift and sued to recover possession of the lands from the defendant —

Held that the transaction amounted to a mere gift which was not supported by consideration since the payment of Rs 8,000 to B was vitiated by the fact that it was in the nature of a bribe and as such was illegal according to Hindu Law and even if it be regarded as a debt contracted by C it could not bind N first because it was contracted for an illegal purpose, and secondly, because N had by his adoption ceased to be C s son at the date of his gift to the defendant and was under no pious obligation to satisfy C s debts

Held further that even if the deed of gift be regarded as supported by valuable consideration, it could not bind the interest of the plaintiffs inasmuch as the property conveyed formed part of the joint ancestral estate in which they took a vested interest by their very birth

Held, also that if the transaction be regarded as one supported by valuable consideration on account of the exchange of lands at Chinchwad it could only amount to a sale of the property and even then it was not competent to N to sell joint ancestral property to the detriment of his sons except for an antecedent debt which had been contracted for a purpose neither illegal nor immoral

Per Curiam —Where on a Hindu s death an adoption is made by his widow it must be made by her, without any coercion free from any corrupt motive and with an eye solely to the fitness of the boy to be adopted to fulfil the religious and secular duties binding on a son That object is likely to be frustrated if she is induced to adopt a boy out of greed for money and

* First Appeal No 169 of 1907

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pecuniary benefit to herself If she is so induced, the money paid to her is a bribe which is condemned by all Smriti writers as an illegal payment

The texts of Hindu Law showing that a gift once made cannot be resumed if it is to a benefactor or to a father apply only as between the donor and the donee and relate to property which it is competent for the donor to give away They cannot affect the joint ancestral estate of a Hindu and his sons Their rights and liabilities are regulated by special texts dealing with that estate, and such of these special texts as relate to gift form exceptions to the general texts on the subject

APPEAL from the decision of M R Nadkarni, First Class Subordinate Judge at Belgaum

Suit to recover possession of certain lands

The lands in dispute were conveyed by way of gift on the 29th March 1888 by one Nana Maharaj (the father of plaintiffs) to his natural brother Shri Sitaram Pandit (the defendant)

The deed of gift came to be executed under the following circumstances

The Pant Pratinidhi of Aundh had a daughter by name Maika, whom he was anxious to settle well in life He selected, as a suitable bridegroom for her, one Nana Maharaj, a man in humble circumstances of life, whom he proposed to get adopted into a rich family

One Bala Maharaj had died in 1866 A D, leaving him surviving a widow named Bhavanibai, and a daughter Taika The said Bhavanibai was under the influence of the Pant Pratinidhi, but to increase his hold on her, he suggested that if she saw her way to adopt Nana Maharaj, he (the Pant Pratinidhi) would be willing to marry one of his sons to her daughter Taika She consented About March—April 1869, two agreements (exhibits 184 and 185) were entered into between the Pant Pratinidhi and Bhavanibai, evidencing this arrangement Later on, two more agreements (exhibits 186 and 74) were executed on the 11th and the 12th November 1869 respectively between Chimna Maharaj (the natural father of Nana Maharaj) and Bhavanibai, under which the latter agreed to adopt Nana Maharaj

Shortly afterwards, the Pant Pratinidhi's son was married to Bhavanibai's daughter Taika and his daughter Maika was married to Nana Maharaj

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As the said Bhavanibai seemed disinclined to make the said doption, Chimna Maharaj as an inducement paid her a sum of s 8,000 on the 19th April 1879, and on the 24th April 1879 Bhavanibai adopted Nana Maharaj About the same time Bhavaibai conveyed as a gift to Chimna Maharaj some lands situated t Chinchwad, yielding an annual income of Rs 188 odd The nds were in the Kolhapur State and were transferred to the ame of Chimna Maharaj The latter, however, did not take ossession thereof because he was anxious to get in exchange nds in British territory

Chimna Maharaj had another son Shri Sitaram Pandit (the efendant), who was the natural brother of Nana Maharaj On he 29th March 1888, Nana Maharaj passed a registered deed of ift in favour of the defendant, whereby he conveyed to the atter some lands forming a part of the estate of Bala Maharaj The consideration for the gift, as recited in the deed, was atural love and affection for the younger brother, and the rouble taken by Chimna Maharaj in getting him (Nana Maharaj) adopted Nana Maharaj died on the 30th June 1899

After his death, his sons (the plaintiffs) disputed the gift to the efendant, and filed, on the 14th February 1903, a suit against im to recover possession of the lands conveyed in gift, alleging hat they formed part of their joint ancestral estate, and that the ift having been unauthoritative, illegal and without consideraion was not binding on the plaintiffs

The defendant contended in his written statement *inter alia* hat Chimna Maharaj gave Nana Maharaj in adoption to Bhavanibai after many entreaties and at a great expense, that n consideration of the benefit thus conferred on him by virtue of he adoption and also of the return of the lands at Chinchwad, he lands in dispute were given to him by way of gift, and that the consideration for the gift having been adequate and awful, the gift was valid and binding on the plaintiff

The Subordinate Judge found that the deed of gift relied on by the defendant was genuine and proved to have been passed by Nana Maharaj He held, however, that it was not binding on the plaintiff

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Shortly afterwards, the Pant Pratinidhi's son was married to Bhavanibai's daughter Taika and his daughter Maika was married to Nana Maharaj

As the said Bhavanibai seemed disinclined to make the said adoption, Chimna Maharaj as an inducement paid her a sum of Rs 8,000 on the 19th April 1879, and on the 24th April 1879 Bhavanibai adopted Nana Maharaj About the same time Bhavanibai conveyed as a gift to Chimna Maharaj some lands situated at Chinchwad, yielding an annual income of Rs 188 odd The lands were in the Kolhapur State and were transferred to the name of Chimna Maharaj The latter, however, did not take possession thereof because he was anxious to get in exchange lands in British territory

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After his death, his sons (the plaintiffs) disputed the gift to the defendant, and filed, on the 14th February 1903, a suit against him to recover possession of the lands conveyed in gift, alleging that they formed part of their joint ancestral estate, and that the gift having been unauthoritative, illegal and without consideration was not binding on the plaintiffs

The defendant contended in his written statement *inter alia* that Chimna Maharaj gave Nana Maharaj in adoption to Bhavanibai after many entreaties and at a great expense, that in consideration of the benefit thus conferred on him by virtue of the adoption and also of the return of the lands at Chinchwad, the lands in dispute were given to him by way of gift, and that the consideration for the gift having been adequate and lawful, the gift was valid and binding on the plaintiffs

The Subordinate Judge found that the deed of gift relied on by the defendant was genuine and proved to have been passed by Nana Maharaj He held, however, that it was not binding on the plaintiff

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The defendant appealed to the High Court

G S Rao, for the appellant, relied on section 25, clause 2 of the Indian Contract Act, 1872, and the Mitakshara, Chapter I, section 1, placitum 28

Jayakar with *M R Bodas*, for respondents Nos 1—4, cited Mitakshara, Chapter I, section 1, placita 27, 28, Vyavahara Mayukha, Chapter I, section 1, placitum 5, Stokes, Chapter I, section 1, placitum 27, *Bachoo Hurkisondas* v *Mankorebai*[1], *Rayakkal* v *Subbanna*[2], *Kamakshi Ammal* v *Chakrapany Chettiar*[3], *W B Thomson* v *Jehangir Hormasji*[4], *Kachayi* v *Udunpumthala*[5], *Madhavrao Moreshvar* v *Kashibai*[6]

C A Rele, for *D I Belvi*, for respondent No 3

G S Rao, in reply, referred to Colebrooke's Digest, Volume II, page 174, Ghose's Hindu Law, 2nd Edn, pages 736, 746

CHANDAVARKAR, J —The appellant is the son of Chimna Maharaj, deceased, and the respondents are the sons of Nana Maharaj, also deceased This Nana Maharaj was the natural born son of Chimna Maharaj but was given in adoption on the 24th of April 1879, to Bhavanibai, widow of one Bala Maharaj Nana Maharaj made a gift of certain lands, belonging to him in virtue of the adoption, to the appellant on the 29th of March 1888 The respondents brought the suit, which has led to this appeal, to recover possession of those lands, on the ground that they were part of the joint ancestral property of their father and themselves of which it was not competent for the father to make a gift The claim was resisted by the appellant on the ground that the gift had been made in consideration of the benefit conferred on Nana Maharaj by the fact of his having been given in adoption by Chimna Maharaj, father of the appellant, into the family, to which the lands belonged, and also of the trouble which the said Chimna Maharaj had to undergo and the expenses he had to incur in persuading Bhavanibai to make the adoption by giving her Rs 8,000 The Subordi

(1) (1907) 31 Bom 373
(2) (1892) 16 Mad 84
(3) (1907) 30 Mad 452
(4) (1866) 3 B H C (O C J) 60
(5) (1905) 29 Mad 68
(6) (1909) 34 Bom 287

nate Judge, who tried the suit, disbelieved the story as to the trouble and the expenses, and held that, even if the story were true, the consideration for the deed of gift in dispute was opposed to public policy He, accordingly, allowed the claim

Certain facts in the case relating to the adoption are admitted by both parties The Pant Pratinidhi of Aundh had a daughter, whom he was anxious to give in marriage to Nana Maharaj But as this Nana Maharaj belonged to a poor family, the Pant conceived the idea of arranging for his adoption into the more well to do family of the deceased Bala Maharaj, whose widow Bhavanibai was under his (the Pant's) influence In the months of March and April 1869, an arrangement, evidenced by exhibits 184 and 185 was arrived at to that effect between the Pant and Bhavanibai In the month of November of the same year, mutual agreements (exhibits 74 and 186) passed between her and Chimna Maharaj that the former should take and the latter give in adoption his son, Nana Maharaj The marriage of Nana Maharaj with the Pant's daughter followed soon after the arrangement and agreements of 1869, nevertheless the adoption itself was delayed for ten years and took place so late as the 24th of April 1879

The cause of this long delay is accounted for by each party according to his own version The appellant's case is that Bhavanibai procrastinated, because she wanted money from Chimna Maharaj before making the adoption, and the latter, who was poor had to borrow and give her Rs 8,000 and Rs 1,000 to her Karkuns to induce her to adopt his son On the other hand, the respondents' version is that it was not Bhavanibai but Chimna Maharaj, who was the cause of the delay They allege that he asked from time to time for the fulfilment of some conditions before he would give his son in adoption and that it was only after all his conditions had been agreed to that he gave the boy

The Subordinate Judge has disbelieved the version of the appellant, but on grounds, which, we think, are not satisfactory The story is supported by the evidence of four witnesses (exhibits 57, 64, 131 and 127), who all depose that Bhavanibai received

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Rs 8,000 from Chimna Maharaj as a motive for adopting his son Further, the appellant has produced a receipt, dated the 10th of April 1879, purporting to have been passed by Bhavanibai to Chimna Maharaj acknowledging the receipt of Rs 8,000 The Subordinate Judge thinks that the attestations on the receipt and its writing are fabricated, and he has arrived at that conclusion by comparing the handwriting on the receipt with the handwriting admittedly genuine of other documents put in for comparison We are unable to agree with the Subordinate Judge after a careful examination of the handwritings In our opinion, the receipt is a genuine document What appears to have mainly influenced the Subordinate Judge in disbelieving the appellant's story as to the payment of Rs 8,000 by Chimna Maharaj to Bhavanibai is that the latter was under the "thumb and influence" of the Pant Pratinidhi of Aundh and that, therefore, "it appears quite unworthy of reliance that she had a sordid pecuniary motive set up by the defendant and testified to by his witnesses Nos 56, 57, 61, 63, 64, 127, 137, to screw out Rs 8,000 from Chimna Maharaj for her adoption of Nana Maharaj" This view of the probabilities of the story overlooks the actual situation of the parties concerned during the period to which the story as to Rs 8,000 relates It is indeed true that the person who was most anxious that Bhavanibai should adopt Nana Maharaj was the Pant Pratinidhi of Aundh He wanted to give his daughter in marriage to the boy, but as the boy's father was, comparatively speaking, poor, he hit upon the idea of adoption He agreed to the marriage of Bhavanibai s daughter with his own son The Pant was, therefore, able to induce her to adopt Nana Maharaj So far it may be allowed that she was under what the Subordinate Judge calls "the thumb and influence" of the Pant But the situation changed after she had agreed to adopt and after, in consequence of her agreement, the Pant had given his daughter in marriage to Nana Maharaj, the boy to be adopted, and after the Pant's son had married her daughter She was then in a position to hold her own and dictate her own terms The Pant's necessity had become all the greater to see the adoption put through, because his daughter had become the boy's wife No such necessity existed to make Bhavanibai

anxious in the matter The adoption, if made, would have deprived her of her widow's estate in her husband's property and she would have relegated herself by her own act to the position of a woman entitled to no more than maintenance out of the estate, she had agreed to adopt, to oblige the Pant, and it was only natural that, when the Pant's daughter had been married to the boy, and the adoption had become to him a matter of urgent necessity, she should take advantage of the situation and delay the adoption till something was given to compensate her for the sacrifices she would have to make, in point of her own ownership over her husband's property, by the adoption There is, therefore, nothing improbable in the story that she would not adopt unless and until she had received some pecuniary compensation for the loss of her position in consequence of the adoption And that such must have been the case is proved by the evidence of an unimpeachable document, to which the Subordinate Judge seems to have paid no attention and against the genuineness of which nothing has been urged In a letter (exhibit 143), dated the 2nd of March 1879, Chimna Maharaj wrote to Gopal Naik, a Kárbhári of the Pant Pratinidhi, that Bhavanibai had agreed to adopt another man by taking from him Rs 15,000 In that letter Chimna Maharaj asked what was the use of his trying to collect money "for nothing" if the lady had changed her mind And he requested Gopal Naik "to make arrangements for getting only Nana Maharaj to be adopted" There is a letter (exhibit 183) from a Kárbhári of the Pant Pratinidhi of Aundh to Bhavanibai, written in April 1879, in which the writer explains to her why the Pant was anxious to see the adoption hastened He says that the Pant's sole object is to see his son in law (Nana Maharaj) and his daughter (Nana Maharaj's wife) happy The writer continues "There is nothing else in this And my master has been exerting himself for about 10 years to carry out this object" He refers to a letter of request to her and to his master's angry letters to him This letter also shows that Bhavanibai was reluctant to adopt and had to be persuaded

It is true that there is no mention in the deed of gift, executed by Nana Maharaj in favour of the appellant, of the payment

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of Rs 8,000 to Bhavanibai by Chimna Maharaj as an inducement to make the adoption The omission is easily accounted for, if due regard be had to the position of the parties and the nature of the act of payment from the social point of view Bhavanibai was the widow of a respectable and well to do man, Nana Maharaj had been adopted by her, and for him to say in the deed that his natural father had given him in adoption by bribing his adoptive mother, and that she had taken him in adoption, not because she had liked him, but because she had been bribed, would have been to cast odium publicly on and lower himself, her, and his natural father Therefore he seems to have contented himself with the bare recital in the deed of gift (exhibit 55) that his natural father had "exerted himself greatly in the matter of giving" him "in adoption"

It has been strenuously contended before us for the respondents that the fact that Chimna Maharaj had insisted upon certain conditions and delayed the adoption makes it highly improbable that the long delay of ten years was due to any unwillingness on the part of Bhavanibai That Chimna Maharaj did ask for *certain conditions and that some time was occupied by negotiations* in respect of them is proved by some letters produced in the case One of those conditions related to the Garbhadhana or marriage consummation ceremony of Nana Maharaj's wife Chimna Maharaj wanted money for it and he was paid by the Pant Pratinidhi of Aundh There is nothing to show that the *money was paid to him for his personal benefit or that it came* from Bhavanibai The presumption is that it was for Nana Maharaj's wife Bhavanibai had agreed to take him in adoption, it was on the faith of that agreement that the Pant had given his daughter in marriage to Nana Maharaj, the girl had come from a Chief's family, and she was to be the daughter in law of Bhavanibai *All religious and social aspects of the case* required that her consummation ceremony should take place with proper regard for her position and her father's and also that of Bhavanibai If the latter had refused to do her duty by the girl on such an occasion consistently with her agreement to adopt and the name and position of her deceased husband, Chimna Maharaj would have *suffered in the esteem of his society*

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Shri Sitaram Pandit v. Shri Harihar Pandit

for having allowed himself and his son to be treated so indifferently by Bhavanibai The fact that Bhavanibai did not pay but that the Pant paid shows that the former was not ready to hasten the adoption As to the other conditions insisted upon by Chimna Maharaj, they all related to securing the property in the adoptive family to Nana Maharaj (see exhibit 108 and exhibit 114) Such a condition would not have been made if Bhavanibai had raised no dispute and tried to have some hold on the property for herself even after adoption

The fact that Chimna Maharaj delayed the adoption for some time because Bhavanibai would not agree to certain conditions is not only not inconsistent with but renders highly probable the fact that Bhavanibai delayed because she wanted some thing for herself before adopting If she was all along willing and ready, where was the occasion for Chimna Maharaj to make certain conditions and for the time occupied in settling them through the Pant Pratinidhi and his Kárbhári? That shows that there was some reluctance on the part of Bhavanibai Chimna Maharaj was to gain everything by the adoption Bhavanibai was to lose almost all from the material point of view And it is incredible that the adoption would have been delayed, for so many as ten years, if all the while Bhavanibai was anxious to adopt

On the whole of the evidence and the probabilities, then, we have arrived at the conclusion that Chimna Maharaj did pay Rs 8,000 to Bhavanibai as an inducement to adopt his son We are not satisfied, however, with the evidence adduced by the appellant to show that the sum of Rs 13,000, due from the husband of Bhavanibai to the Pant Pratinidhi of Aundh on a mortgage, was remitted by the latter owing to the friendly intercession and at the request of Chimna Maharaj That the debt was wiped out and the mortgage redeemed without payment is proved The respondents' *mukhtiar* (exhibit 182) admits it But he states that the Pant extinguished the debt, because Nana Maharaj had refused to send his wife (the Pant's daughter) to the thread ceremony of her brother unless the mortgage was returned to him This seems highly probable The remission

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for having allowed himself and his son to be treated so indifferently by Bhavanibai The fact that Bhavanibai did not pay but that the Pant paid shows that the former was not ready to hasten the adoption As to the other conditions insisted upon by Chimna Maharaj, they all related to securing the property in the adoptive family to Nana Maharaj (see exhibit 108 and exhibit 114) Such a condition would not have been made if Bhavanibai had raised no dispute and tried to have some hold on the property for herself even after adoption

The fact that Chimna Maharaj delayed the adoption for some time because Bhavanibai would not agree to certain conditions is not only not inconsistent with but renders highly probable the fact that Bhavanibai delayed because she wanted something for herself before adopting If she was all along willing and ready, where was the occasion for Chimna Maharaj to make certain conditions and for the time occupied in settling them through the Pant Pratinidhi and his Kárbhári? That shows that there was some reluctance on the part of Bhavanibai Chimna Maharaj was to gain everything by the adoption Bhavanibai was to lose almost all from the material point of view And it is incredible that the adoption would have been delayed, for so many as ten years, if all the while Bhavanibai was anxious to adopt

On the whole of the evidence and the probabilities, then, we have arrived at the conclusion that Chimna Maharaj did pay Rs 8,000 to Bhavanibai as an inducement to adopt his son We are not satisfied, however, with the evidence adduced by the appellant to show that the sum of Rs 13,000, due from the husband of Bhavanibai to the Pant Pratinidhi of Aundh on a mortgage, was remitted by the latter owing to the friendly intercession and at the request of Chimna Maharaj That the debt was wiped out and the mortgage redeemed without payment is proved The respondents' *mukhtiar* (exhibit 182) admits it But he states that the Pant extinguished the debt, because Nana Maharaj had refused to send his wife (the Pant's daughter) to the thread ceremony of her brother unless the mortgage was returned to him This seems highly probable The remission

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took place after Bhavanibai's death And the Pant must have remitted the debt mainly because the debtor was his own son in law The story that the debt was remitted at the request of Chimna Maharaj stands upon the interested and uncorroborated testimony of the appellant

It is also the appellant's case that before his adoption Nana Maharaj had promised to Chimna Maharaj that, after adoption, he would grant to the latter in perpetuity lands yielding an annual income of Rs 1,000 This is deposed to by the appellant (exhibit 231), and by his mother (exhibit 127) Both of them say that the promise was made in writing "for the trouble and expense of the work of adoption" The written agreement is not produced, and the deed of gift makes no reference to it There are some other witnesses who speak to the promise and it is sought to be proved also by certain letters purporting to be those of Nana Maharaj Even if there was such an agreement, it is not shown to be supported by any consideration, and even if it were supported by consideration, it was illegal, because it was made by Nana Maharaj as an expectant heir with reference to property which he *hoped* to get after his adoption by Bhavanibai Such an agreement is invalid and inoperative according to Hindu Law *Sham Sunder Lal* v *Acchan Kunwar*(1) and see *Sumsuddin* v *Abdul Husein* (2), where other decisions to the same effect are cited In any case, Nana Maharaj's promise cannot render the deed of gift valid, if it is invalid on other grounds

The appellant also pleads that the lands conveyed by the deed of gift (exhibit 55) were given to him by Nana Maharaj in exchange for the lands at Chinchwad, situate in the Native State of Kolhapur, and yielding an annual income of Rs 188 odd, which Bhavanibai had granted by a deed (exhibit 62) to Chimna Maharaj on the day of the adoption Chimna Maharaj was not satisfied with the grant and desired instead lands situate in British territory He never took possession of the lands at Chinchwad But the grant had been followed by directions to the village officers that they should recognise him as owner,

(1) (1898) 25 I A 183 at p. 190 (2) (1906) 31 Bom 165, at p 171

enter the khata in his name, and allow him to appropriate the rents and profits There is no mention of the exchange in the deed of gift (exhibit 55), but the probabilities are strongly in favour of the appellant's case on this point

The established facts, then, relating to the deed of gift, which is in dispute in this case, are shortly these After she had bound herself by an agreement to adopt Nana Maharaj, Bhavanibai refused to carry it out unless she was paid a sum of money Nana Maharaj's natural father, Chimna Maharaj, paid Rs 8,000 as an inducement to her to adopt his son Then the adoption took place, and Chimna Maharaj, being poor, obtained lands at Chinchwad, yielding an annual income of Rs 188 odd for parting with his son In consideration of the payment of Rs 8,000 to Bhavanibai and in exchange for the lands at Chinchwad and also having regard to the benefit he had derived from the act of his natural father in giving him in adoption into a well to do family, Nana Maharaj conveyed by way of gift the lands in the deed (exhibit 55) to the appellant, his natural brother

The transaction, under these circumstances, amounts to a mere gift It was urged before us that it was supported by consideration, because of the payment of Rs 8 000 made by Chimna Maharaj to Bhavanibai for the benefit of Nana Maharaj, that is to say to induce her to adopt the latter as her son The amount, it is said, was paid by Chimna Maharaj by borrowing, Nana Maharaj was then still the son of Chimna Maharaj and as such it was his pious duty to pay his father s debt

But the payment to Bavanibai was vitiated by the fact that it was in the nature of a bribe and as such was illegal, according to Hindu Law

When a Hindu gives his boy in adoption, his act is, according to the Hindu Shastras, in the nature of a sacred gift, voluntarily made It is on that account that Manu requires the gift to be "confirmed by pouring water" [Vyavahar Mayukha Mandlik's Edition, page 50] A daughter *given* in marriage, which is called *kanyadana*, and a son *given* in adoption, which is called *putradana*,

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stand in this respect on the same footing Both are gifts for religious and secular purposes Both acts are attended by religious ceremonies, both require *giving* and *taking* A boy is adopted by a sonless Hindu for perpetuating his line, paying off his dues to his ancestors, keeping up his name, and securing for him and his ancestors a place in heaven These are sacred purposes, according to the Hindu Shastras It is not by the mere birth and existence of a son that these purposes are fulfilled As Vijnaneshwara points out in the Mitakshara in the chapter on "Rituals," the son must be "well behaved", of good qualities That applies to the adopted son equally, because he takes the place of a born son, and he has to be "a reflection" of the latter Where on a Hindu's death the adoption is made by his widow, it must be made by her, without any coercion, free from any corrupt motive and with an eye solely to the fitness of the boy to be adopted to fulfil the religious and secular duties binding on a son That object is likely to be frustrated, if she is induced to adopt a boy out of greed for money and pecuniary benefit to herself If she is so induced, the money paid to her is a bribe, which is condemned by all *Smriti* writers as an illegal payment Narada, for instance, says that what has been given as a bribe is "declared as not given (or void)" And he lays down that "*utkocha* (or bribe), which is promised to be given for the accomplishment of any object, should not be given, even if that object be accomplished But if it has already been actually given, it should be restored by force, and a fine equal to eleven times (its value) should be inflicted according to the followers of Garga" [The Vyavahara Mayukha, Mandlik's Edition pages 128 and 124] Vijnaneshwara in his chapter on "the Resumption of Gifts" in the Mitakshara, quotes Narada to the same effect, and defines a "bribe" (*utkocha*) to mean "something paid to a person bound to do an act with the object of removing an obstacle to the performance of his duty" Judged by this definition, the payment of Rs 6 000 to Bhavanibai was a bribe At the date of the payment she had already bound herself to adopt Nana Maharaj, and the payment was made to induce her to do what she had already been under an obligation to perform

The payment of Rs 8,000, illegal in its inception, may have been made by Chimna Maharaj after borrowing the amount from third parties But even regarded as a debt contracted by him, it could not bind his sons because it was contracted for an illegal purpose, which was its payment as a bribe Further, Nana Maharaj by his adoption had ceased to be Chimna Maharaj's son at the date of his gift to the appellant and was under no pious obligation to satisfy Chimna Maharaj's debts

Nana Maharaj's deed of gift was, it is urged, supported by valuable consideration, because it was to his natural brother out of love and affection, in consideration of the benefit conferred by his natural father by giving him in adoption, and in exchange for the lands at Chinchwad But the question is whether such a deed relating to joint ancestral property binds the sons of its executant, who, according to Hindu Law took a vested interest in it by birth A Hindu father is not competent to make a gift of such property, if it is immoveable and is joint ancestral estate Citing certain texts Vijnaneshwara says that the passages quoted by him "forbid a gift of immoveable property through favour, they both relate to immoveables which have descended from the paternal grandfather" [The Mit, Ch I, sec 1, pl 21]

Certain texts of Hindu Law have been relied upon by Mr Rao, for the appellant, showing that a gift once made cannot be resumed, if it is to 'a benefactor,' (Colebrooke's Dig, Vol I, p 419), or to a father, (Ghose's Hindu Law (2nd Edn) p 736 and p 748) These texts apply as between the donor and the donee and relate to property which it was competent for the donor to give away They cannot affect the joint ancestral estate of a Hindu and his sons Their rights and liabilities are governed by special texts dealing with that estate, and such of these special texts as relate to gifts form exceptions to the general texts on the subject

If the transaction evidenced by the deed (exhibit 55) is to be regarded as one supported by valuable consideration on account of the exchange of lands conveyed by it for the lands at

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Chinchwad, given to Chimna Maharaj by Bhavanibai on the day that she adopted Nana Maharaj it could only amount to a sale of the property But a Hindu father is not competent to sell joint ancestral property to the detriment of his sons, except for an *antecedent* debt, which had been contracted for a purpose neither illegal nor immoral In the present case, there was no debt at all, in fact, even if there had been an antecedent debt of Chimna Maharaj, Nana Maharaj had ceased to be his son legally liable For these reasons the decree appealed from must be confirmed with costs

HEATON, J —I concur

Decree confirmed

R P

APPELLATE CIVIL

Before Mr Justice Batchelor and Mr Justice Rao

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RANCHODLAL VANDRAVANDAS PATVARI AND ANOTHER (ORIGINAL DEFENDANTS) APPELLANTS v THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL PLAINTIFFS) RESPONDENTS *

Evidence Act (I of 1872) section 115—Estoppel—Acquiescence—Both parties equally conversant with true state of facts—Vague allegations—Real controversy to be ascertained by the Judge

Where parties make vague and loose allegations it is always essential to the correct determination of the suit that the real controversy between them should be ascertained by the Judge by questioning their legal advisers as to what is exactly their position in the matter

Where both parties to a suit are equally conversant with the true state of facts, it is absurd to refer to the doctrine of estoppel

In the year 1871 Government granted to the defendants' predecessor in title a certain plot of land situate at Dhandhuka. The grant expressly stated that a strip of land belonging to Government was the southern boundary of the plot so granted. This statement was repeated in a mortgage-deed executed by the

* First Appeal No. 169 of 1909

defendants predecessor in title to the defendants themselves in the year 1893 In the year 1895 the defendants purchased the said plot and encroached on the strip by extending their building on it Thereupon the Secretary of State for India in Council brought a suit against them to recover possession of the strip after removing the defendants encroachment The suit was brought in the year 1908 The defendants plea was that they were in possession and enjoyment for a long time and consequently there was acquiescence and estoppel on the part of the officers of Government and Dhandhuka Municipality and they wished to lead evidence to prove their plea

Held that the defendants title deeds having brought to their knowledge the title of the Government the doctrines of estoppel and acquiescence were not applicable, and the suit was governed by sixty years limitation, the Government being a party to it

FIRST Appeal from the decision of Dayaram Gidumal, District Judge of Ahmedabad in original Suit No 103 of 1908

Suit by the Secretary of State for India in Council to recover possession of a Naveli (small strip of land) 68 feet in length and 2 feet in breadth, for removal of defendants' encroachment and for a permanent injunction

The whole plot of land including the Naveli was at one time the property of Government A portion of the plot to the north of the Naveli was sold by Government to the defendants predecessor in title in the year 1871 and another portion to the south to one Dullabh Damodar, the predecessor in title of Harjivandas in 1862 The sale deed passed by Government to the defendants' predecessor recited that the Naveli was the southern boundary of the portion purchased by him from Government Similarly the Naveli was described as the northern boundary of the portion purchased by Dullabh Damodar, predecessor of Harjivandas *In the year 1893 the defendants'* predecessor in title passed a mortgage deed to the defendants which stated that the Naveli was the southern boundary of the mortgaged property Harjivandas built a Dharmshála on the site purchased by him from the said Dullabh Damodar and one Bapuji Jagannath was the trustee in possession of the said Dharmshála The defendants purchased their land from their predecessor in the year 1895 and thereafter they encroached on the Naveli by extending their building on it Hence the suit which was filed in the year 1908

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The defendants set up their ownership but the allegation made by them in their written statements being very vague and loose, the District Judge questioned their pleaders to determine the real point involved in the case and raised the following issue —

Has the Government intentionally caused or permitted defendants and their predecessors to believe that the land was theirs and to act upon such belief?

The Judge found on the said issue in the negative and awarded the plaintiff's claim His reasons were as follows —

But where is the estoppel in the case? The Crown makes its meaning quite clear in its grant It has always been the practice of every enlightened Government when selling land in lots to provide for light and air and for easy access The rules framed under section 214 of the Bombay Land Revenue Code on the subject of building sites contain clear provisions on the subject In this particular case Government sold two plots and reserved a space 2 feet broad between them The defendants predecessors were expressly told so The defendants if they read the original grant must have seen at once that that place was reserved and was not included within those boundaries Does it lie in their mouths to say that they attached no importance to their own title deed? Is the Government after making its meaning quite clear in the grant bound to go on telling every grantee about the terms of the written grant and about their meaning? Are its officers to attend to such minute matters as the user of Navelis 2 feet broad by neighbouring house owners? It is because Government cannot well prevent encroachments on such small pieces of land and because their functions are multifarious, that the limitation period of 60 years is allowed to the Crown Its acquiescence for a shorter period does not bar its suit (see 27 Bom at page 532 where the authorities are quoted) Had defendants pleaded adverse possession for 59 years 11 months and 29 days they would not have succeeded Their possession being not so long they have not set up the plea of adverse possession But whose case would be the harder of the two—that of a man who was actually in possession for nearly 60 years and was then dispossessed or that of a man who knew what the Government had granted to him encroached on what was not his own for about 48 years and being unable *to show possession for 60 years was dispossessed*? The defendants plea of estoppel has been put forward only because the limitation of 60 years protects the Government

It has been laid down by the Privy Council (see 11 W R P C 61) that the acts of a Government officer bind the Government only when he is acting in the discharge of a certain duty within the limits of his authority, or, if he exceed that authority when the Government in fact or in law directly or by implication ratifies the excess" Had it been alleged by the defendants that after seeing the original grant they had gone to the Collector or the Co

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missioner and been told that the grant, though it reserved the 2 feet, meant that the 2 feet were the defendants would the Government have been bound by such a statement? I doubt very much The Collector or the Commissioner would be held, I think to have exceeded their authority in ascribing a meaning to the words of Government which those words plainly did not bear at all The defendants however do not say that any statement was made to them by any of the officers of Government to the effect that the Naveli was the defendants It is not even alleged that the Government land registers of survey records were allowed to be examined by the defendants or their predecessors or that copies were taken of the entries and those entries were misleading Had such copies been taken they would have been produced with the documents put in by the defendants

* * * * * *

Now I think this brief history of the case proves that the defendants did not know their own mind either when they put in their written statement or when the issues were framed or amended—or even when they came to argue the case There has been continual see sawing—'The land was sold to us by Government

'The land was not sold to us—it was reserved—but Government have intentionally permitted us to believe that the land is ours and to act on that belief

'The land has been considered by Government appurtenant to our tenement "Section 115 of the Evidence Act does not apply and we rely upon other facts constituting estoppel section 115 not being exhaustive"

These various statements hardly indicate a belief even on the defendants' part that Government have misled them to their prejudice Had they been really misled they would have spoken with no uncertain voice on the point

There is also another confusion in the defendants mind. The acts and omissions of the Dhandhuka Municipality are not the acts and omissions of Government Notice to that Municipality is not notice to Government Notice to Bapuji who is merely an attorney of Government for this suit and who was never an attorney of Government before is not notice to Government

The truth is defendants have had the misfortune to be hauled up before the 60 years period and they are doing their best to wriggle out of that unpleasant situation by means of plea of estoppel Their main complaint really is "Why did not the Government sue us earlier To that the Government reply "We had 60 years They charge Government with negligence but they forget their own negligence in not examining the original title-deed

The defendants appealed

D A Khare and *M K Mehta* for the appellants (defendants)

Coyaji, with *G N Thakore*, for the respondent (plaintiff)

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RANCHODLAL VANDRAVANDAS PATVARI v THE SECRETARY OF STATE FOR INDIA

BATCHELOR, J —This is an appeal against a decree made by the District Judge of Ahmedabad in favour of the plaintiff the Secretary of State for India in Council

The suit was filed to recover possession of a small strip of land about 68 feet long and about 2 feet broad with a Naveli or passage which ran between the defendants' properties on the north and the Dharmshála, of which one Bapuji Jagannath was the trustee in possession, to the south Although the nominal plaintiff is thus the Secretary of State for India in Council, the real plaintiff who is substantially interested in the fate of the suit is Bapuji the trustee in possession of the Dharmshála

The plaintiff claimed to recover possession of this strip of land after removing from it certain encroachments made on it by the defendants' buildings

Great difficulty was experienced in the Court below in ascertaining the real ground upon which the defendants sought to meet the plaintiff's case They began by setting up their own title, then they abandoned this ground and in lieu of it relied upon certain allegations as to acquiescence and estoppel on the part of the servants of the plaintiff Their allegations however upon this head were so vague and loose that the learned District Judge found it necessary to question their legal adviser as to what exactly his position was in this matter

As this action of the District Judge has been subjected to some little criticism here, we take occasion to say that in our opinion that action was not only justifiable but laudable It was essential to the correct determination of this suit, as it always is essential, that the real controversy between the parties should be ascertained by the learned Judge After giving the pleader time to consider his attitude, the Judge asked him to explain clearly what he meant by saying that the suit was barred by estoppel and acquiescence Exhibit 38 records the pleader's answer in full and from it we extract the following sentences "The land is not entered in the Government records in any of the land registers relating to the town of Dhandhuka The land has been in our possession and enjoyment for the last more than 48 years We built on the land after receiving permission from the Muni

cipality in 1895 All the Government Officers at Dhandhuka are aware of the fact that we built at Dhandhuka The building was inspected from time to time by Municipal Officers when it was being erected and they have made reports to that effect In various maps made by the order of the Municipality and by the orders of the Revenue Authorities, the land has been shown as ours, and the Commissioner and the Government have also decided that they cannot eject us They have not said in those orders that the land is ours"

Upon consideration of the pleadings supplemented by the statement given by both pleaders from one of which the foregoing passage is extracted, the learned District Judge came to the conclusion that the defendants had made no case to entitle them to go into evidence inasmuch as their own title deeds informed them of the fact that the ownership of the disputed strip of land was with the Government and the Government had 60 years' period of limitation within which to assert its rights

The defendants now appeal here contending that the learned Judge was wrong in shutting them out from the possibility of leading evidence and they urge that, whether they are able or not to establish the proposition for which they contend, they ought at least to be provided with full opportunity of doing so

It seems to us, however, that the District Judge was right in the view which he took of the case The defendants' own title deed is exhibit 61, which we have read and which in plain terms sets out that the strip of land in suit is the property of the Government The defendants must be taken to be acquainted with their title deed which is dated 1871, and in consequence to be aware that the Government is the owner of this land The same statement, moreover, is made also in exhibit 31, the title-deed of Bapuji, and also in exhibit 29, the mortgage deed, executed in 1893 by the defendants' predecessors to the defendants themselves

With these statements of the Government's title brought to the defendants' knowledge by these deeds, it seems to us that the ground for invoking such doctrines as estoppel and acquiescence is cut away from under the defendants' feet

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As appears from the language of section 115 of the Evidence Act itself and as was observed by Sir Charles Farran in *Honapa* v *Narsapa*[1] "when both parties are equally conversant with the true state of the facts, it is absurd to refer to the doctrine of estoppel"

Reference may also be made with advantage to what was said by the Privy Council in *Beni Ram* v *Kundan Lal*[2] where their Lordships regretted that a loose and inadequate statement of the rule of equity had obtained currency in the lower Courts They go on to explain that "the proposition of acquiescence if it were supplemented, might possibly be made to apply to the case where the owner of land sees another person erecting buildings upon it, and knowing that such other person is under the mistaken belief that the land is his own property, purposely abstains from interference, with the view of claiming the building when it is erected"

The same propositions were also considered at length by Lord Cranworth in *Ramsden* v *Dyson*[3] His Lordship says "But it will be observed that to raise such an equity two things are required, first, that the person expending the money supposes himself to be building on his own land, and, secondly, that the real owner at the time of the expenditure knows that the land belongs to him and not to the person expending the money in the belief that he is the owner For if a stranger builds on my land knowing it to be mine, there is no principle of equity which would prevent my claiming the land with the benefit of all the expenditure made on it There would be nothing in my conduct, active or passive, making it inequitable in me to assert my legal rights" And in such a case as we have here, where the building was done with the knowledge that the land belonged to another, there, his Lordship says of the builder, "He knew the extent of his interest, and it was his folly to expend money upon a title which he knew would or might soon come to an end"

(1) (1898) 23 Bom. 406 at 409 (2) (1899) 21 All. 496 at 502.
(3) (1865) 1 F and I A C 129 at 141

We are of opinion, as the learned Judge below was of opinion, that the case before us is aptly described in the foregoing passages, in other words, that it is a case where the defendants, being perfectly aware that the land in suit was the property of the Government and that they, the defendants, had no rights over it beyond certain easements encroached upon it in the hope that their encroachment upon this small inconspicuous strip of land might escape the notice of the agents of the plaintiff in the town of Dhandhuka In fact it would seem to have escaped their notice for a period of 13 years, but the Government have a period of 60 years under the law of limitation and there is no question that the suit is in time

We would observe also that accepting the case as put by the defendants' pleader in the words which we have cited, we think that it makes no case for the admission of evidence The Secretary of State is in no way concerned with anything which may have been done by the Municipality or the officers of the Municipality It cannot in the circumstances of this case assist the defendants if in certain maps of the Revenue Authorities made by those Authorities for their own guidance, this strip of land is inaccurately described

As to the assertion that the Commissioner and the Government have decided that they cannot eject the defendants, that is obviously beside the mark For, the Commissioner's order referred to is exhibit 30, and all that that Officer decided is that the contending parties, that is to say, Bapuji and the defendants would be wise to decide their difference by a Civil Suit, and in the meanwhile that it was unnecessary for Government to fight the battle of the Dharmshala, and all that the Government did was to approve and confirm this very non-committal order of the Commissioner

Upon the whole, therefore, we are of opinion that the case made by the defendants themselves put them out of Court and that the learned Judge was right in so deciding and in refusing to allow them to give evidence which could lead nowhere and serve no useful purpose

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We, therefore, dismiss this appeal with costs confirming the decree with this variation that instead of possession being awarded for the usage mentioned in paragraph 2 of the plaint, possession will be awarded subject only to the easements existing over the land in favour of defendants as owners of the northern premises

Decree varied

G B R

APPELLATE CIVIL

Before Mr Justice Batchelor and Mr Justice Rao

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KISHANDAS SHIVRAM MARWADI PLAINTIFF v NAMA RAMA VIR DEFENDANT *

Compromise—Decree in terms of the compromise—Application for decree—Terms of the compromise opposed to law—Public policy—Instalments—Default—Payment of whole sum—Dekkhan Agriculturists Relief Act (XVII of 1879), section 15B clause (2) †

A suit brought against an agriculturist defendant to recover money by sale of mortgaged property was compromised on the terms that the defendant should pay the amount in equal annual instalments and that on failure to pay any two

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* Civil Reference No 3 of 1910

† The Dekkhan Agriculturists Relief Act (XVII of 1879), section 15B runs as follows —

(1) The Court may in its discretion in passing a decree for redemption foreclosure or sale in any suit of the descriptions mentioned in section 3, clause (y) or clause (z) or in the course of any proceedings under a decree for redemption foreclosure or sale passed in any such suit whether before or after this Act comes into force direct that any amount payable by the mortgagor under that decree shall be payable in such instalments on such dates and on such terms as to the payment of interest and where the mortgagee is in possession as to the appropriation of the profits and accounting therefore as it thinks fit.

(2) If a sum payable under any such direction is not paid when due the Court shall except for reasons to be recorded by it in writing instead of making an order for the sale of the entire property mortgaged or for foreclosure, order the sale of such portion only of the property as it may think necessary for the realization of that sum

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instalments the plaintiff should be at liberty to realise the whole of the balance by sale of the entire mortgaged property through the Court The compromise was brought before the Court with a view to obtain a decree in its terms The defendant when examined by the Court agreed to be bound by its terms which were explained to him The Subordinate Judge however felt doubt as to the validity of the compromise and referred for opinion the following two questions to the High Court (1) whether the compromise was lawful although it provided that in default of the payment of two instalments the plaintiff should realize the whole balance due by sale of the entire mortgaged property, such provision having been opposed to section 15B, clause (2) of the Dekkhan Agriculturists Relief Act 1879 and (2) whether the Court was bound to pass a decree on a compromise of this character

Held that the term ' that in default of payment of two instalments the whole mortgaged property shall be liable to sale was contrary to public policy as declared in section 15B clause (2) of the Dekkhan Agriculturists Relief Act 1879 and that therefore it was not competent to the Court to pass a decree which would be in conflict with the statutory provision

Held further, that the mere fact that the defendant though apprised of the terms of the compromise agreed to it did not invest the Court with jurisdiction to pass a decree to carry out the compromise

THIS was a civil reference made by T R Kotwal, Subordinate Judge of Talegaon and Sasvad

The plaintiff instituted a suit against the defendant, who was an agriculturist, to recover the money due on a mortgage executed by the latter During the pendency of the suit, the parties settled their differences and arrived at a compromise, the terms of which were as follows —

Defendant should pay Rs 100 as claimed and costs and the full fees of the pleader *viz*, Rs 10 in the Fálgun of Shake 1831 and yearly Rs 10 in each future Fálgun and the instalment should be paid till the whole sum was paid off If defendant makes default in payment of any two instalments plaintiff should realize the whole sum by sale of the property described in the plaint through the Court'

The above compromise was presented to the Court for a decree to be passed in its terms The defendant was examined by the Court and the terms of the compromise were explained to him He then agreed to be bound by those terms The Subordinate Judge, however, felt doubt as to his competence to pass a decree in terms of the compromise, and referred the following two questions to the High Court for opinion —

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KISHANDAS SHIVRAM MARWADI v NAMA PAMA VIR

1 Is the above agreement or compromise lawful which provides that in default of two instalments the plaintiff should realize the whole balance due by sale of the property it being contrary to the provisions of section 15B (2) of the Dekkhan Agriculturists Relief Act, as construed in *Pandharinath* v *Shankar*, 8 Bombay L R page 488?

2 Is the above case to be applied only to decrees passed by the Court or also to compromises or consent decrees based on compromises or to agreements filed under section 44 of the Dekkhan Agriculturists Relief Act?

On the questions referred the opinion of the Subordinate Judge was in the negative His reasons for the opinion were expressed as follows —

"The judgment of FARRAN, C J, in I L R 22 Bombay 238 shows that when a compromise is brought within the provisions of the Dekkhan Agri-turists Relief Act it would be governed by that Act The particular c[illegible] not fall under the Act The case in I L R 26 Mad 31 shows that [illegible] the compromise as recorded by exhibit 15 the Court will disregard [illegible] so far as they are contrary to the Dekkhan Agriculturists' Relief [illegible] strued by the Bombay High Court So far as a decree embod[illegible] terms of a compromise it is inoperative and will not be enforced [illegible] would have no jurisdiction to pass a decree on a compromise [illegible] lawful O XXIII r 3 A Judge disregarding the ruling of the [illegible] to which he is subordinate would be acting contrary to law and his [illegible] a case would be open to revision by the High Court under section [illegible] I L R 25 All 509 at 523, 524, I L R 17 Mad 410 If the above [illegible] is correct the compromise becomes unlawful being opposed to the co[illegible] of section 15B (2) of the Dekkhan Agriculturists Relief Act and [illegible] should not pass a decree on it *Rama* v *Ramchand*, Printed Judgm[illegible] page 456 As an argument in favour of supporting the compromise a[illegible] out th[e] maxim *quilibet potest renunciare juri pro se introducto* may be r[illegible] *i e* anyone may, at his pleasure renounce the benefit of a stipulation o[illegible] right introduced entirely in his own favour Broom s Legal Maxims[illegible] pp 531 to 537, I L R 27 Bombay, page 10 The only doubt is wheth[illegible] agriculturists case would come under the proviso to the rule set out [illegible] 537 The maxim is inapplicable if an agriculturist enters into an a[illegible] as the one noted above by which he is deprived of that protec[illegible] by the Dekkhan Agriculturists Relief Act he is absolutely [illegible] I L R 2[illegible] Bombay 2[illegible]2 F B at 2[illegible]8, 2[illegible]9 it is remarked that looking a[illegible] policy of the Ac[t] and its avowed intention to afford relief to indebted [agri]culturists we think that no obstacle should be placed in the way of mak[ing] its remedies as wide reaching as possible "

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Another argument advanced in favour of the compromise is one arising from the great hardship and inconvenience as a result of the ruling in

8 *Bombay Law Reporter* Broom's Legal Maxims pp 146 148 It is asked how many times is the decree to be made absolute, if it is to be done at each time the instalment falls due? How are the difficulties of effecting a sale to realize an instalment to be got over?

The suit falls under sections 3, 4 and 10 of the Dekkhan Agriculturists Relief Act and no appeal lies from my decree If I pass a decree under Order XXIII, r 3 in terms of the compromise there will be no appeal, section 96 (3) Civil Procedure Code

The reference was heard by Batchelor and Rao, JJ

B V Vidwans (*amicus curiae*) —

The rule of law contained in section 15B, clause (2) of the Dekkhan Agriculturists Relief Act, 1879, applies only when Court passes a decree after an investigation of the claim policy [illegible] not apply to compromise which is an act of the parties Relief [illegible] policy of the Act is to encourage compromise by the a decree wi[illegible]le policy of the Act is directed the provisions about conciliation [illegible]d to this end is directed the provisions about conciliation

Held fur[illegible] See *Piraji v Ganapati*[1]

terms of the [illegible] for the defendant —

to pass a dec[illegible]*ole* (*amicus curiae*) for the defendant —

THIS wa[illegible]ms of the compromise in question are in direct conflict Judge of [illegible] provisions of section 15B, clause (2) The Court should

The pl[illegible] a compromise into a decree, if it contains any terms an agricu[illegible]to the provisions of any statute See also *Pandharinath* by the [illegible]*kar*[2], *Rama v Ramchandra*[3], and *Lakshmanswami* settled th[illegible] *Rangamma*[4]

of which [illegible]HELOR, J —We are obliged to the learned pleaders who

Defe[illegible]sisted the Court with their arguments

pleader [illegible] is a reference by the Subordinate Judge of Talegaon and future [illegible] in a suit brought by the assignee of a mortgage for the off. If [illegible] of the mortgage money due on a simple bond, dated should [illegible] 18th June 1897

The defendant admitted the mortgage bond and the receipt of the consideration

The plaintiff and the defendant entered into a compromise which is exhibit 15, and which provides that the defend[illegible]

(1) (1910) 34 Bom 602.

(2) (1903) 8 Bom L R 483

(3) (1894) P J 456

(4) (1902) 6 Mad 31

1910

KISHANDAS SHIVRAM MARWADI v. NAMA RAMA VIR

should pay Rs. 100 as claimed and costs, namely, Rs 10 in Fálgun of Shake 1831 and yearly Rs 10 in each future Fálgun and so on until the whole sum was paid off, if defendant should make default in payment of any two instalments, then it was provided that the plaintiff should realize the whole sum by sale of the entire mortgaged property through the Court

The defendant admitted the assignment deed produced by the plaintiff The parties prayed for a decree to be passed in terms of this compromise, and the defendant, on being examined by the Court and on the terms of the compromise being explained to him, agreed to be bound by it

Thereupon the learned Subordinate Judge refers to us two questions, (1) whether the aforesaid compromise is lawful although it provides that in default of the payment of two instalments the plaintiff should realize the whole balance due by sale of the entire mortgaged property, such provision being opposed to section 15B, clause (2) of the Dekkhan Agriculturists' Relief Act, and (2) whether the Court was bound to pass a decree on a compromise of this character

The Subordinate Judge thought that both questions should be answered in the negative, and we are of the same opinion

A compromise is merely an agreement between the parties to settle an existing dispute and if it is to be enforceable in law it must not contain a term opposed to public policy, see *Lakshmanaswami Naidu v. Rangamma*[1] Here the term "that in default of payment of two instalments the whole mortgaged property shall be liable to sale" is contrary to public policy, for the public policy upon this point is declared in section 15B (2) of the Act which enacts that in such circumstances not the whole mortgaged property but only such part of it as may be necessary for the realization of the overdue instalments shall be liable to sale

We think, therefore, that it is not competent to the Court to pass a decree which would be in conflict with a clear provision of the Statute and we are supported in this view by the decision in *Rama valad Lava Dhere v. Lamchand valad Fulchand*[2]

(1) (1902) 26 Mad 31 (2) (1894) 1 J 4[illegible]

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Ki handas Shivram Marwadi v. Nama Rama Vir

We are of opinion, moreover, that the mere fact, that the defendant though apprised of the terms of the compromise agreed to it, does not invest the Court with jurisdiction to pass a decree to carry out such a compromise It must be observed that the only knowledge which appears to have been brought home to the defendant is a knowledge of the terms of the compromise, not a knowledge of his legal position under the specially favourable Dekkhan Agriculturists' Relief Act That is important in connection with section 12 of the Act which deals with admissions by the debtor, and requires the Court to be satisfied before giving effect to such admissions, that they were made with the full knowledge of the debtor's legal rights as against the creditor This section and section 13 seem to us to indicate that the object of the Act was to place the defendant-agriculturists' interests rather in the hands of the Court for protection than to trust them to the hands of the defendant himself

And section 44 may be referred to for guidance as to the manner in which the Court receiving an agreement should scrutinize it The section declares that before accepting such an agreement the Court must be of opinion that it is a legal and equitable agreement, a description which we think cannot be applied to compromise which is in direct variance with the provisions of section 15B (2) of the Act

The case of *Piraji* v *Ganapati*[1] is not in point, for the compromise which was there allowed was not alleged to contain any term in conflict with the Statute

For these reasons therefore we answer in the negative both the questions which have been referred to us

Order accordingly

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(1) (1910) 34 Bom 607

ORIGINAL CIVIL

Before Sir Basil Scott Kt Chief Justice

In the matter of the Indian Arbitration Act (IX of 1899)

1910 *August 6*

TRIBHUWANDAS KALIDANDAS GAJJAR PETITIONER v JIVANCHAND LALLUBHAI AND Co, RESPONDENTS.

Indian Arbitration Act (IX of 1899), sections 11 and 15—'Award'—Civil Procedure Code (Act V of 1908) schedule I, Order XXI rule 29

An award filed in Court under section 11 of the Indian Arbitration Act (IX of 1899) is nothing more than an award although it is enforceable as if it were a decree

Execution of such an award cannot be stayed under Order XXI rule 29 of the Civil Procedure Code (Act V of 1908)

PROCEEDINGS in chambers

The petitioner above named had been employed by the respondents for some years, when certain disputes arose between them and a reference was made to arbitration The respondents, however, shortly afterwards filed a suit against the petitioner, contending (*inter alia*) that the agreement between them was illegal and void Another suit, No 850 of 1909 was thereafter filed against the petitioner and the respondents by Gulabchand Munalal and Co for the taking of accounts of a partnership which had previously existed between the parties It was alleged in this suit (*inter alia*) that the petitioner was liable to refund to the partnership assets a large sum which he had prematurely withdrawn

Eventually a settlement was arrived at between the petitioner and the respondents, and on 19th January 1910 an award was made in the arbitration ordering the respondents to pay to the petitioner Rs 2,15,000 (Rs 1,00,000 on 25th January 1910, and the balance in monthly instalments of Rs 10,000), and a consent decree was passed in the suit filed by the respondents. The above settlement was without prejudice to the rights of the parties in Suit No 850 of 1909

In pursuance of the award the respondents duly paid sums amounting to Rs 1 50,000, but made default in payment of the instalment due on 25th July 1910, claiming to retain the balance

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against the amount which the petitioner was himself liable to refund in Suit No 850 of 1909

On 1st August 1910 the petitioner applied for execution under section 15 of the Indian Arbitration Act, and on the same day the respondents paying Rs 10,000 into Court, took out a summons against him to show cause why execution should not be stayed until the final disposal of Suit No 850 of 1909

The summons was argued before Scott, C J, in chambers

Jardine, acting Advocate General, appeared to show cause for the petitioner

Taleyarkhan appeared for the respondents

Scott, C J —On the 1st of August 1910 a summons was obtained from the Sitting Judge in chambers headed "In the matter of the Arbitration between Professor Tribhuwandas Kalliandas Gajjar and the firm of Messrs Jivanchand Lallubhai and Co, and in the matter of the Indian Arbitration Act IX of 1899—Professor Tribhuwandas Kalliandas Gajjar—Petitioner, and Lallubhai Dharamchand and the other partners in Jivanchand Lallubhai and Co—Respondents," calling on the above named petitioner to appear and show cause, if any he hath, why the execution of the award, dated the 19th January 1910, should not be stayed until the final disposal of Suit No 850 of 1909.

The award of the 19th January 1910 was an award made under the provisions of the Indian Arbitration Act IX of 1899, whereby the firm of Jivanchand Lallubhai and Co were directed to pay to Tribhuwandas K. Gajjar the sum of Rs 2,15 000, Rs 1,00,000 being payable at once and Rs 10 000 every subsequent month At the time of the summons there still remained payable by monthly instalments a sum of Rs 65,000 Up to that time no steps had been taken to obtain the assistance of the Court in securing the payment of the amount of the award but under the provisions of the Indian Arbitration Act the petitioner would be entitled to enforce the award as if it were a decree of the Court

On the strength of that provision in section 15 of the Indian Arbitration Act the parties against whom the award has been made contend that this Court, under Order XXI, rule 29 of the

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TRIBHUVANDAS KALLIANDAS GAJJAR v JIVANCHAND

Civil Procedure Code, should stay the execution of the award until the disposal of Suit No 850 of 1909 That is a suit filed by Gulabchand Munalal against Kasturchand Daya, the firm of Jivanchand Lallubhai and Co, the present respondents, and the petitioner, T K Gajjar, for the winding up of a partnership in which, it is said, the petitioner was entitled to a share of profits, although not liable for losses, and is liable to the partnership for monies withdrawn to the extent of Rs 90,000

Now, such an order for stay can only be made by the Court, if there is a suit pending on the part of a person against whom a decree has been passed, against the holder of a decree of the Court It appears to me that the petitioner is not a holder of a decree of the Court, nor are the firm of Jivanchand Lallubhai and Co persons against whom a decree has been passed, for the award, to which the applicants seek to give the force of a decree, is nothing more than an award, although it is enforceable as if it were a decree In the words of Fletcher Moulton, L J, used with reference to section 12 of the English Arbitration Act of 1889, that section "gives no power to turn such an award into a judgment It gives to the award the same status as a judgment for the purpose of enforcement, but it leaves it what it was before, viz, an award" See *In re a Bankruptcy Notice*(1)

The application is therefore, in my opinion, misconceived, and it is unnecessary to discuss the further question which might arise as to whether Suit No 850 by Gulabchand Munalal is such a suit as is within the contemplation of Order XXI, rule 29 of the Civil Procedure Code, even if we assume that the award is a decree within the meaning of that rule

I, therefore, discharge the summons with costs

Attorneys for petitioner Messrs *Bicknell, Merwanji and Romer*

Attorneys for opponents Messrs *Tyabji, Dayabhai and Co*

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(1) [1907] 1 K B 478

ORIGINAL CIVIL

Before Mr Justice Macleod

JEEWANBAI, PLAINTIFF, v. MANORDAS LACHMONDAS AND OTHERS DEFENDANTS * — 1910 *August 12*

Mortgage—Assignment of mortgage—Application of rule of damdupat—Transfer of Property Act (IV of 1882) section 2 (d) †

The fact that the person entitled to sue on a mortgage happens by assignment to be a Parsee cannot affect the (Hindu) mortgagor's right to claim the advantage of the rule of damdupat if it existed when the mortgage was entered into

It is not proper to infer that because it has been expressly enacted that nothing in Chapter II of the Transfer of Property Act (IV of 1882) shall be deemed to affect any rule of Hindu Law the Legislature has deprived a Hindu mortgagor of the protection afforded him by the rule of damdupat

The right of a mortgagee to sue for his principal and interest is a right arising from a contract and must be taken to be made subject to the usages and customs of the contracting parties

ON 29th May 1890 Pandu Powshia mortgaged his interest in certain immoveable property at Dadar to Manekchand Hirachand and Panachand Hirachand for Rs 1,000, and on 16th July 1894 he mortgaged his interest in certain immoveable property at Naigaum to Kashinath Vishvanath for Rs 2000, with a further charge at a later date for Rs 1,000 In 1895 the above mortgagees assigned their respective interests under the mortgages and further charge to one Girdhardas Ghanshamdas who acted as the nominee of Vithaldas Ramdas By a deed of 28th June 1897, Vithaldas Ramdas mortgaged his interests in the properties above mentioned and also another immoveable property of which he was absolute owner, to B S Chothia to secure the payment of Rs 1,30,000 balance due on certain transactions between the parties On 26th April 1900 he executed a further charge in favour of Chothia for Rs 32,500 Between 28th June 1897 and 26th April 1900 Vithaldas Ramdas

* Suit No 502 of 1909.

† ... and nothing in the second chapter of this Act shall be deemed to affect any rule of Hindu, Muhammadan or Buddhist Law

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JEEVANBAI v. MANORDAS LACHMONDAS.

made further mortgages of his own property above mentioned and of his interest in the property at Naigaum first to J N Tata and then to H A. Wadia. Finally, on 6th October 1901, Pandu Powshia created a further charge on his interest in the Naigaum and Dadar properties in favour of Messrs. Dikshit and Dhanjishaw, Solicitors, to secure Rs 5 000 due for costs incurred in certain suits

In October 1905 Chothia filed this suit to enforce payment of the money due under the mortgages, and for foreclosure in default of payment On Chothia's death his widow Jeewanbai was substituted in his place, and when the suit came to trial, there were in all 8 defendants The first 3 were the legal representatives of Vithaldas Ramdas (the original 1st defendant), the 4th and 5th (original 2nd and 3rd) were the legal representatives of J N Tata, and the 6th (original 4th) was H A Wadia. Messrs Dikshit and Dhanjishaw (original 5th) were the 7th defendants, and Pandu Powshia (original 6th) was the 8th defendant None of the first 6 defendants filed a written statement, and no objection was made by the 4th, 5th or 6th defendant to the plaintiff's tacking his further charge of *26th* April 1900 on to his original mortgage-debt of 28th June 1897 The 7th and 8th defendants, however were both contentious It was contended by them that the rule of damdupat applied and that thus the plaintiff could not recover in the way of interest a sum greater than the principal. The 8th defendant further pleaded that the mortgages had been obtained by fraud and misrepresentation

Jardine, acting Advocate-General, with *Jinnah* and *Bhandarkar* for the plaintiff

Desai, with *Thakore*, for 2nd defendant

Bahadurji, with *Tarachand*, for 7th defendant

Shortt, with him *Setalwad*, for the 8th defendant

MACLEOD, J —On the 29th May 1890 the 8th defendant mortgaged his interest in certain property at Dadar to Manekchand Hirachand and Panachand Hirachand to secure the repayment of Rs 1,000 and interest

On the 16th July 1891 the 8th defendant mortgaged his interest in certain property at Naigaum to Kashinath Vishvanath to secure the repayment of Rs 2,000 and interest

On 17th February 1895 a further charge for Rs 1,000 was endorsed on the last mentioned mortgage

On the 20th July 1895 Manel chand Hirachand and Panachand Hirachand assigned their interest in the mortgage of the Dadar property to Girdhardas Ghanshamdas

On the 25th October 1895 Kashinath Vishvanath also assigned *his interest in the mortgage and further charge on the Naigaum* property to Girdhardas Ghanshamdas

In these assignments Girdhardas acted as the nominee of Vithaldas Ramdas

On the 28th June 1897 Vithaldas Ramdas mortgaged his interests in the abovementioned mortgages and further charge together with his rights in certain other properties to Bomanji Shapurji Chothia to secure the repayment of Rs 1,30,000 and interest, and on the 26th April 1900 Vithaldas executed in favour of Chothia a further charge for Rs 32,500

The original 5th defendants are second mortgagees of the 8th defendant's interest in the Dadar and Naigaum properties

The original 2nd, 3rd and 4th defendants represented subsequent mortgagees by Vithaldas Ramdas and were interested in redeeming the plaintiff After suit filed the plaintiff died, and his widow and executrix was substituted in his place Vithaldas Ramdas also died, and the present defendants 1, 2 and 3 were placed on the record as his heirs and legal representatives

The plaintiff prayed that the then 5th and 6th defendants should pay him Rs 17,397 9 0 due on the mortgage and further charge on the Dadar and Naigaum properties and that the first 4 defendants should pay him the Rs 2,20,395-3 9 due on the mortgage and further charge of the 28th June 1897 and 26th April 1900, and in default for foreclosure or sale The plaintiff has come to terms with those who now represent the first 4 defendants The 8th defendant filed a highly contentious written statement pleading *inter alia* that the mortgages and

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further charge of the Dadar and Naigaum properties had been obtained in fraud of him When, however, the time came for the 8th defendant's counsel to address the Court on the issues raised by him, counsel was no longer in evidence and, after waiting some time, I had to finish the hearing of the case without him In any event it was clear that any claim that the 8th defendant might have had to set aside these deeds on the ground alleged was time-barred As regards the contention that there had been a misjoinder of causes of action and parties and that the suit was embarrassing against the 8th defendant, it is difficult to see how the plaintiff could have sued on the mortgage of 1897 and further charge of 1900 without making the original mortgagor of the Dadar and Naigaum properties a defendant It must be said that he has not been in any way prejudiced or embarrassed

Then the only important question remaining was the one raised by the now 7th defendant who was second mortgagee of the Dadar and Naigaum properties and so interested in redeeming them from the plaintiff, namely, whether the rule of damdupat should be applied in calculating the amount due on the second mortgagees and further charge above mentioned It clearly applied to the mortgage of the 29th May 1890, and the fact that the person entitled to sue on it happened by assignment to be a Parsee could not affect the mortgagor's right to claim the advantage of the rule, which certainly existed when the mortgage was entered into

As regards the mortgage of July 1894 and further charge of February 1895, it has been argued for the plaintiff that they were executed after the Transfer of Property Act had been extended to this Presidency, and that therefore the rule of damdupat can no longer prevent a mortgagee from availing himself of his right to recover his principal and interest from a Hindu mortgagor who has bound himself to repay the same

By section 2 of the Act in the territories to which the Act extends for the time being the enactments in the schedule to the Act are repealed to the extent therein mentioned and by sub clause (*d*) nothing in the second chapter of the Act which

refers to transfers of property by act of parties shall be deemed to affect any rule of Hindu, Mahomedan or Buddhist Law

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From this it is contended that the provisions of Chapter IV relating to mortgages of immoveable property and charges and of section 65 in particular do affect the rule of damdupat The point does not seem to have arisen in any reported case It was certainly decided in *Sundarabai v Jayavant Bhikaji*[1] that the rule of damdupat applied in all cases of mortgages as between Hindu debtors and creditors except where a mortgagee in possession is accountable for profits, but the mortgage then before the Court was executed in 1861 before the Transfer of Property Act was passed, and there is nothing in the report to indicate that any suggestion was made that the extension of the Act to Bombay might affect the application of the rule Sitting as a Court of first instance, I do not think I should be justified in holding that because it has been expressly enacted that nothing in Chapter II of the Act shall be deemed to affect any rule of Hindu Law it must be deduced therefrom that the Legislature has deprived a Hindu mortgagor of the protection afforded to him by the rule of damdupat before the Act was extended to Bombay A perusal of the provisions of Chapter II of the Act will show how necessary it was to expressly enact that they should not affect any rule of Hindu Law, but the right of a mortgagee to sue for his principal and interest is a right arising from a contract and must be taken to be made subject to the usages and customs of the contracting parties

I am therefore of opinion that the plaintiff cannot recover in the way of interest on the mortgage and further charge of the Naigaum property a larger sum than the principal amount due on the said mortgage and further charge

Plaintiff's counsel stated in the course of the argument that he had come to terms with the defendants 1 to 6 other than defendant 3 who is dead, and certain terms of consent were handed into the Court

(1) (1899) 24 Bom 114.

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The plaintiff, therefore, is entitled to an ordinary mortgage decree with costs, (1) as regards defendants 1 to 6, other than defendant 3, in accordance with those consent terms except in so far as they may be inconsistent with this judgment and except that any application for a foreclosure and sale of the properties in Schedule C must be made hereafter by notice, and (2) as regards defendant 8 in accordance with this judgment Defendant 7 can add his costs to his mortgage

Liberty to apply

Attorneys for the plaintiff Messrs *Pestonji, Rustim § Kolah*

Attorneys for defendants 1 and 2 Messrs *Shamrao, Minochehr § Hiralal*

Attorneys for defendant 7 Messrs *Dikshit, Dhanjishah § Soonderdas*

Attorneys for defendant 8 Messrs *Smetham, Byrne & Co*

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APPELLATE CIVIL

Before Mr Justice Batchelor and Mr Justice Rao

1910
October 11

RADHABAI WIFE OF KRISHNAJI RAVJI (ORIGINAL PLAINTIFF) v RAMCHANDRA VISHNU AND OTHERS (ORIGINAL DEFENDANTS) RESPONDENTS AND RAMCHANDRA VISHNU (ORIGINAL DEFENDANT 1) APPELLANT v RADHABAI WIFE OF KRISHNAJI RAVJI (ORIGINAL PLAINTIFF), RESPONDENT *

Dekkhan Agriculturists Relief Act ([illegible] of 1879)—Wife of an agriculturist—Status—Suit by mortgagee to recover possession—Prayer for payment of principal and interest at certain rate—Decree—Payment of principal and interest—Payment of interest at certain rate till the principal is doubled—Contractual relation not superseded by the decree—Redemption suit—Accounts

Under the provisions of the Dekkhan Agriculturists Relief Act (XVII of 1879) the wife of an agriculturist cannot claim to be an agriculturist

* Cross Second Appeals Nos. 8[illegible]3 and 1210 of 1903.

A decree obtained by a mortgagee in the year 1867 to recover possession of the mortgaged property set out that the plaintiff (mortgagee) was suing for possession of the mortgaged land with a prayer that until possession should be delivered over or until the mortgage money was paid off, interest should be awarded at the rate of 2 per cent per mensem. The decree then ordered that the mortgagor should pay to the plaintiff (mortgagee) Rs 300 and interest, Rs 27 in respect of his claim. "Until payment of the moneys or until the principal is doubled interest should be paid at the rate of 2 per cent per mensem from 30th July 1867 and until payment of the moneys the land mortgaged which was asked for in the suit should be handed over according to agreement. And the defendant should redeem the land by paying the plaintiff's money."

Subsequently the mortgagor having brought a suit for redemption and accounts, it was contended that the plaintiff's right to have accounts taken from the mortgagee in possession was lost by reason of the aforesaid decree.

Held, that the terms of the decree did not deprive the mortgagor of a right to accounts. The decree did not supersede the contractual relation but by putting the mortgagee into possession merely carried out the terms of the contract which for the rest it preserved and kept alive. There was no foreclosure either in fact or in intention, and it was in his capacity as mortgagee entitled by the contract to possession that he was put into possession by the said decree.

SECOND Appeal from the decision of C. Roper, District Judge of Satara, varying the decree of D. W. Bhat, Subordinate Judge of Tasgaum.

Suit for redemption of mortgaged property and accounts.

The lands in dispute originally belonged to one Vamnaji Govind, who mortgaged them to his creditor Vishnu Trimbak Paranjpe for Rs. 300 under a mortgage deed, dated the 14th July 1863. Subsequently both the mortgagor and mortgagee having died, the mortgagee's brother, Balkrishna, brought a suit, No. 797 of 1867, in the Court of the Subordinate Judge of Tasgaum against the mortgagor's widow, Lakshmibai *alias* Chandrabai, to recover possession of the mortgaged property. The plaint in the said suit contained the following prayer:—

"Possession of the land described above may be awarded. Until the possession of the land is delivered or until the moneys are paid off, interest at the rate of rupees two per cent. per mensem, and (also) interest on the Court costs may be awarded in cash from the defendant Lakshmibai *alias* Chandrabai."

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RADHABAI v. RAMCHANDRA VISHNU, AND LAMCHANDRA VISHNU v. RADHABAI.

On the 28th September 1887 the Court passed a decree as follows —

The defendant Vamnaji Govind deceased, (represented) by his widow Lakshmibai *alias* Chandrabai should pay to the plaintiff Balkrishna principal Rs 300 (three hundred) and interest Rs 27 in respect of his claim Until the payment of the moneys or until the principal is doubled, interest should be paid at the rate of 2 per cent per mensem from the 30th of July 1887 and until payment of the moneys the mortgaged land having the above four boundaries which is asked for in the suit should be handed over according to the agreement And the defendant should redeem the land by paying the plaintiff's moneys The defendant do pay the Court costs incurred by the plaintiff as detailed below

Under the said decree the mortgagee having recovered and continued in possession the plaintiff Radhabai the daughter and heir of the mortgagor Vamnaji Govind, brought the present suit in the Court of the Subordinate Judge of Tasgaum against the mortgagee's son Ramchandra Vishnu Paranjpe to redeem and recover possession of the property in suit, alleging that she was an agriculturist, that the profits of the property had satisfied the mortgage debt and that the defendant refused to render her a true and proper account of the mortgage transaction Ramchandra Vishnu Paranjpe was joined as defendant 1, and the other defendants being in possession as tenants under defendant 1, they were joined as defendants 2—5

Defendant 1 denied the plaintiff's status as an agriculturist and contended *inter alia* that the amount due to him under the mortgage was Rs 1,038 4 11 including Rs 380, which he had to pay to a prior mortgagee for recovering possession

Defendant 2 did not tender a written statement

Defendant 3 was absent though duly served

Defendants 4 and 5 stated that they were tenants under defendant 1 and that they would give up possession on the expiry of the period of their tenancy

The Subordinate Judge found that the plaintiff was not an agriculturist, that defendant 1 had recovered Rs 2,510 4 3 as the income of the mortgaged property and that nothing was due to him on account of the mortgage transaction A decree was,

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RADHABAI v. RAMCHANDRA VISHNU AND RAMCHANDRA VISHNU v. RADHABAI

therefore, passed directing the plaintiff to recover possession without paying anything to defendant 1

On appeal by defendant 1, the District Judge, following the rulings in *Nalu* v. *Raghu*[1], *Rambhat* v. *Ragho Krishna Deshpande*[2] and *Tani Bagrau* v. *Hari bin Bhavani Dubal*[3], found that defendant 1 was not liable to render an account to the plaintiff, who was bound to pay the sum due under the decree in Suit No 797 of 1867, exhibit 38, before recovering possession of the property in suit The decree of the Subordinate Judge was, therefore, varied by directing the plaintiff to recover possession on payment, within two years, of Rs 627 to defendant 1

The plaintiff and defendant 1 preferred cross second appeals, No 823 and No 219 of 1903 respectively

Nilkanth Atmaram for the appellant (plaintiff) in Second Appeal No 823 and respondent in Second Appeal No 219 of 1908 —

There are two points in the case —(1) Whether the plaintiff, being the wife of an agriculturist, can claim her husband's status, and (2) whether the decree of 1867 precludes an account being taken from the mortgagee in possession

With respect to the first point we submit that the plaintiff is an agriculturist under the terms of the Dekkhan Agriculturists' Relief Act, being the wife of a person who is an agriculturist She has got no independent source of income to live upon The wife of an agriculturist cannot but be an agriculturist In the eye of the law, the husband and wife are one person

As regards the second point we submit that the first Court took a correct view of the decree, exhibit 38 In that suit the mortgagee merely asked for possession to which he was entitled under the terms of the mortgage bond and the decree gave it to him The relation that subsisted between the mortgagor and mortgagee prior to the decree continued after the decree with this difference that under the decree the

(1) (1884) 8 Bom 303 (2) (1892) 16 Bom 696

(3) (1887) 10 Bom 609

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mortgagee got possession A mortgagee in possession is liable to render account of the profits to the mortgagor —*Dattatraya Ravji* v *Anaji Ramchandra*[1], *Sri Raja Papamma Rao* v *Sri Vira Pratapa H V Ramchandra Razu*[2], *Pandu* v *Vithu*[3], and section 77 of the Transfer of Property Act The cases relied on by the learned District Judge are distinguishable

P P Khare for the respondent (defendant 1) in Second Appeal No 823 and appellant in Second Appeal No 219 of 1908 —

On a proper construction of the decree, exhibit 38, it will be found that the view taken by the lower Court is the correct one and the mortgagee cannot, after a decree on the mortgage has been passed, be called upon to account In addition to the cases cited in the Judgment of the lower Court we rely on *Tatya Vithoji* v *Bapu Balaji*[4] and the unreported judgment in Second Appeal No 568 of 1901, *Valabh Krishna* v *Natha* The last unreported case is on all fours with the present one

With respect to our second appeal, No 219 of 1908, we contend that the lower Court committed an error in not awarding us Rs 380 which we had to pay to a prior mortgagee for recovering possession section 74 of the Transfer of Property Act

BATCHELOR, J —The plaintiff sued as an agriculturist to redeem a mortgage and to recover possession of the mortgaged property on payment of any sum which the Court might find to be still owing to the defendants, the representatives of the original mortgagee The mortgage was executed in 1863, and the sum secured was Rs 300 It was admitted that the mortgagee went into possession in 1867 under the decree of the Court, and has since remained in possession

The defendants denied that the plaintiff was an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act and claimed that Rs 1,038 4 11 were due on the mortgage, including a sum of Rs 380 which the mortgagee had to pay to prior mortgagee before he could go into possession under the decree of 1867

(1) (1866) P J p 273
(2) (1896) 19 Mad 249
(3) (1894) 19 Bom 140
(4) (1883) 7 Bom 33

The Court of first instance found that the plaintiff was not an agriculturist, and that on accounts taken, the mortgagee had already received Rs 2,549 4 3 from the rents and profits of the mortgaged property it, therefore, decreed redemption without any further payment, but it made no order for the refund to the plaintiff of the excess payment

The defendants appealed to the District Court, where it was held that the plaintiff was not an agriculturist, and that the defendants were relieved of any liability to account by reason of the former decree in the suit of 1867 The mortgagee's claim to the Rs 380 was also refused

Dealing first with the plaintiff's appeal, we have to determine whether the Court below was wrong (1) in holding that the plaintiff is not an agriculturist within the Act and (2) in holding that the plaintiff's right to have accounts taken from the mortgagee in possession was lost by reason of the decree of 1867

On the first point we have no hesitation in agreeing with the District Judge The sole ground on which the plaintiff claims to be an agriculturist is that she is the wife of an agriculturist but that circumstance does not, we think, constitute her an agriculturist within the meaning of the Act She does not earn her livelihood by agriculture, but by being the wife of her husband he might change his occupation to morrow, but she would not be affected by the change It seems to us that she can no more be called an agriculturist because her husband is an agriculturist than she could be called an engineer, or a doctor if her husband happened to follow one of those professions

As to the second point the decree of 1867 is exhibit 38 in the case It sets out that the then plaintiff, the mortgagee, was suing for possession of the mortgaged land, that is we infer for possession under the terms of the mortgage bond, and there was a prayer that, until possession should be delivered over, or until the mortgage money was paid off, interest should be awarded at the rate of 2 per cent per mensem The decree then orders that the mortgagor "should pay to the plaintiff (the mortgagee) Rs 300 and interest, Rs 27, in respect of his claim Until payment of the moneys, or until the principal is doubled,

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interest should be paid at the rate of 2 per cent per mensem from 30th July 1867, and until payment of the money the land mortgaged, which is asked for in the suit should be handed over according to the agreement And the defendant should redeem the land by paying the plaintiff's money " It should be noted that the instrument of mortgage is not produced

The question is whether the terms of this decree deprive the mortgagor of a right to accounts in the present suit

For the respondents reliance is placed on *Narlu* v *Raghu*[1] and *Rambhat* v *Ragho Krishna Deshpande*[2], it being argued that the case of *Dattatraya Raiji* v *Anaji Ramchandra*[3] is distinguishable on the precise ground on which in the Full Bench decision in *Tani Bagavan* v *Hari*[4] it was distinguished from *Narlu* v *Raghu*, namely, that in *Dattatraya's*[3] case the decree simply awarded possession of the mortgaged property whereas here, as in *Tani Bagavan* v *Hari*, the decree directs the payment of a certain sum found to be due and enjoins that, until that sum is paid, possession is to remain with the mortgagee

We think that this contention must be conceded, and that so far the present case does fall outside the ruling in *Dattatraya* v *Anaji*[3] But it still remains to consider whether in other respects it can be brought within *Narlu* v *Raghu*[1] and the cases which followed that decision and which are, whether we agree with them or not, binding upon us

We entirely concur in what was said by Farran, J, in *Tani Bagavan* v *Hari* as to the manner in which such a case as this should be approached In such a suit said that learned Judge, "all that the Court is at liberty to do is to construe the decree in the former suit to ascertain its intention from the expressions contained in it, and to give effect to that intention when so ascertained" We must therefore, be guided primarily by the actual terms of the particular decree of 1867, and for that reason we have set them out in full Among those terms is a provision

(1) (1884) 8 Bom 393
(2) (1892) 16 Bom 606
(3) 1886 P J, p 237
(4) (1887) 16 Bom 609

for future interest, which at once distinguishes this decree from the decrees considered in the cases cited for the respondents and shows that the relation of mortgagor and mortgagee was intended to continue The decree on its face contemplates the taking of an account in the future to ascertain the amount of accrued interest due to the mortgagee and, since the remedies between the parties are mutual, that implies that an account be taken also of rents and profits debitable to the mortgagee It may be observed further that, under the decree, possession is to be delivered to the mortgagee ' according to the agreement," that is, we understand, according to the mortgage agreement, so that this provision also negatives the theory that the decree was intended to act as a foreclosure decree or to extinguish the contractual relation between the parties This point is made still clearer by the order that the mortgagor should, that is, should at some future date redeem the property by paying the sum due and we can only read these words as contemplating a future suit to redeem on payment of such sum as may then be found to be due We are, therefore, of opinion that the decree did not supersede the contractual relation, to employ the language of West, J, in *Naika v Raghu*[1], but by putting the mortgagee into possess on merely carried out the terms of the contract, which for the rest it preserved and kept alive "

There was no foreclosure either in fact or in intention, and it was in his capacity as mortgagee, entitled by the contract to possession, that the defendant's predecessor was put into possession by the Court's decree The facts thus resemble those which were before the Judicial Committee in *Sri Raja Papamma Rao v Sri Vira Pratapa H V Ramchandra Razu*[2] where their Lordships say, in language which appears appropriate to the present suit —"It is sufficient that the mortgagee, not being entitled to foreclosure and not asking for it, got a decree which did not purport to work foreclosure It purported to give possession 'as provided in the terms of the bond' and did not purport to put an end to the bond and to the relations of mortgagor and mortgagee altogether It could, though

(1) (1884) 8 Bom 303 (2) (1896) 19 Mad. 249

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subject to correction on appeal, give possession, and did so The mortgagee thereupon became mortgagee in possession, and as such he must submit to be redeemed"

If the above decision is in point it is manifest that it cannot be displaced by any ruling of this Court, and that would be sufficient answer to Mr Khare's reference to the unreported case of *Vallabh Krishna* v *Natha*, which was decided in 1902 by Sir Lawrence Jenkins, C J, and Batty, J, in Second Appeal No 568 of 1901 There, moreover, the Court observed that "as redemption could be only on the terms expressed in the decree, the taking of accounts is beside the question" The decree then in question is not now before us, but we infer from the words cited that it contained a clause definitely negativing the taking of accounts in future, in the decree with which we are concerned there is no such provision

On these grounds we hold that the Subordinate Judge was right in allowing accounts to be taken and since the mortgagor did not appeal against the order absolving the mortgagee from liability for any surplus receipts over and above the sum necessary for redemption, we cannot now impose any further liability in that respect

It is clear also that the Subordinate Judge was right in allowing the mortgagee credit for the Rs 380 which he paid to the prior mortgagees in order to obtain possession Under section 74 of the Transfer of Property Act the mortgagee was entitled to redeem the earlier encumbrance

For these reasons we reverse the decree of the District Judge and restore that of the Subordinate Judge The appellant will have his costs throughout in Appeal No 823 of 1907, and in Appeal No 219 of 1908 there will be no order as to costs

Decree reversed

G B R

ORIGINAL CIVIL

Before Mr Justice Robertson

BALURAM RAMKISSEN AND OTHERS PLAINTIFFS, v BAI PANNABAI AND ANOTHER DEFENDANTS * 1910 *July 26*

Practice—Procedure—Civil Procedure Code (Act V of 1908) Order V, Rule 25—Service of summons by registered post on defendant residing out of British India—Summons returned marked 'Refused to take'—General Clauses Act (X of 1897), section 27

A summons was sent by registered post addressed to the first defendant at Navalgarh in the State of Jaipur and purported to be sent in accordance with the provisions of Order V, Rule 25 of the Civil Procedure Code (Act V of 1908) The cover was returned with an endorsement in the vernacular which was translated as follows —" Refused to take The handwriting of Chunilal, postman.

Held, that as it appeared that the cover was properly addressed to the first defendant and had been registered duly stamped and posted, the Court was entitled to draw the inference indicated in section 27 of the General Clauses Act and to hold that there was sufficient service

Per Curiam—The only rule if it can be called a rule to be laid down, is that the Court must be guided in each case by its special circumstances as to how far it will give effect to a return of a cover endorsed 'refused' or words to the like effect

Jagannath Brakhbhau v *J E Sassoon*(1) distinguished

THE FACTS of this case appear sufficiently from the judgment

Kanga for the plaintiffs

No appearance for the defendants

ROBERTSON, J —In this case a question has arisen whether the service of the summons upon the first defendant is sufficiently proved

It appears the summons was sent by registered post addressed to the first defendant at Navalgarh in the State of Jaipur, and purports to have been sent in accordance with the provisions of

* Suit No 393 of 1910

(1) (1893) 18 Bom 606

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Order V, Rule 25, of the new Code The cover has been returned with an endorsement in the vernacular which has been translated as follows —"Refused to take The handwriting of Chunilal, postman"

Now, the question as to whether this is a good service or not is not altogether without authority In *Jagannath Brakhbhau* v *J E Sassoon*(1), a decision of Sir Charles Sargent and Mr Justice Bayley, it was held, under similar circumstances, where a postal packet was returned endorsed "refused," that the service was bad, and the Small Cause Court in accepting it as good service had acted with material irregularity At first sight that case appears to be directly in point But it has been urged by Mr Kanga that in two important respects it differs from the present case In the first place the defendant in that case was residing in British territory and the Code did not provide for service on him by registered post, and secondly that the decision was prior to the last General Clauses Act I, therefore, think I am entitled to deal with this case without being bound or precluded by this decision

The next decision upon the point is *Aga Gulam Husain* v *A D Sassoon*(2), the important passage in the case being at page 418 In that case Mr Justice Candy held that the summons was duly served, although the postal cover was returned as "refused' Then he proceeds to say that there was in addition indirect evidence of the service of the summons or at any rate of the knowledge of the defendant of the suit

In *Jogendro Chunder Ghose* v *Dwarka Nath Karmokar*(3), very much the same point came before Messrs Justices Pigot and Rampini The difficulty of applying that case lies in a certain ambiguity in the judgment and in the head note, which is not cleared up in the statement of facts The head note says that the cover (that is, the letter) that contained the summons was returned with an endorsement upon it purporting to be made by an officer of the Post Office stating the refusal of the

(1) (1893) 18 Bom 606 (2) (1897) 21 Bom 412 at p 418
(3) (1888) 15 Cal. 681

addressee to receive the letter And the judgment of the Court is put in this way —"With an endorsement upon it purporting to be by an officer of the Post Office stating the refusal by the defendant to receive the document" The exact terms of the endorsement are not given If the endorsement stated in precise terms that the letter was refused, by the defendant, and not merely as in the present case "Refused to take' without saying by whom, then the decision loses most of its weight as applied to this case

In *Fakhr ud din* v *Ghafur ud-din*(1) the same point was considered, and there the learned Judges, Sir Arthur Strachey and Mr Justice Banerji, came to the decision that "where a summons is sent by post to a defendant residing out of British India, it is not, in the absence of evidence that the person to be served was at the time residing at the place to which the summons was sent, sufficient to show that the summons was posted, but there must be some evidence of its having been received by the defendant"

Having regard to the terms of section 27 of the General Clauses Act, which, so far as I know, has not been referred to in any of the previous decisions, it would appear that when the expression used is "send", (which is the expression used in the rule under consideration), "then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered The difficulty lies in the effect given to the words "unless the contrary is proved," and, in my opinion, having regard to the decisions that I have already quoted, the only rule, if it can be called a rule, to be laid down is that the Court must be guided in each case by its special circumstances as to how far it will give effect to a return of a cover endorsed "refused", or words to the like effect It seems impossible to lay down any hard and fast rule either precluding the Court from accepting that

(1) (1900) 23 All. 99

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as service or laying down any particular evidence supplemental to that return so endorsed on the cover, which would be sufficient to satisfy the Court that the summons has been served To attempt to lay down any such rule, would, in my opinion, having regard to the provisions of the Code and the decisions that I have referred to, be to legislate and not to interpret the Acts and apply the previous decisions Therefore it appears to me that it is open to the Court in each case on its own particular circumstances to be satisfied or not satisfied with such a return as the case may be I may say that if the circumstances were such as to require further evidence, that the nature of such further evidence has already been indicated in the two decisions, to which I have referred, *i e*, *Aga Gulam Husain* v *A D Sassoon*[1] and *Fakhr-ud din* v *Ghafur ud-din*[2]

In this particular case, it appears that the cover was properly addressed to the first defendant It appears to have been registered and duly stamped There can be no question about the posting, because the cover bears the registration ticket and the post office stamp Therefore I am entitled to draw the inference that is indicated in section 27 of the General Clauses Act, and in addition to that there is evidence that this lady, the first defendant, was residing at Navalgarh at about the time when the cover containing the summons was sent to her I am entitled under the Code and under the authorities to hold that this is sufficient service and I accordingly do so

Attorneys for the plaintiff Messrs *J R Patil & Co*

No attorney for the defendant

Decree for 1st and 2nd Plaintiff

B N L

(1) (1897) 21 Bom 412. (2) (1900) 23 All 90

ORIGINAL CIVIL

Before Mr Justice Robertson

FAKIRUDDIN BIN AMIRUDDIN ZIAWOODDIN, PLAINTIFF, v ABDUL HUSSEIN PEERBHOY DEFENDANT * 1910 *July* 19

Mahomedan Law—Minor—Right to sell minor s property—Necessity—Bonâ fide purcha er without notice

By a deed of conveyance dated 19th January 1904 one N purported to convey on behalf of herself and her minor son, the plaintiff, certain immoveable property to the defendant for the consideration of Rs 7,000 On the same day N passed an indemnity bond in favour of the defendant indemnifying him against the claim of the plaintiff The plaintiff sued to have the said d ed of conveyance declared void and for a declaration that the plaintiff was entitled to the whole of the property purported to be conveyed

Held the plaintiff was entitled to succeed on the grounds that (1) there was absolutely no evidence that the sale was in any way necessary for the mainten ance of the minor, (2) the purchaser was not a *bona fide* purchaser without notice of the plaintiff's rights

The purchaser of an estate who takes with notice of a breach of trust is in the same position as the vendor who committed the breach of trust

THE FACTS of this case appear sufficiently from the judgment
Weldon and *Kanga* for the plaintiff

There was no necessity for Noorbibi to sell the property Even assuming such necessity, Noorbibi could not have sold the property without the order of the Court, *Baba* v *Shivappa*[1], *Sita Ram* v *Amir Begam*[2], *Pathummabi* v *Vittil Ummachabi*[3] Nor would the sale be binding even so far as Noorbibi's ⅛th share in the property is concerned, since she has squandered the cash portion of her share as also the income of the whole property belonging to herself and the plaintiff, she has therefore lost her interest in this immoveable property, for if an account were taken she would be found indebted to her son This being so the defendant, who is a purchaser from her would simply stand in her shoes and could not possibly claim to be in a better

* Suit No. 82 of 1910

(1) (1895) 20 Bom 199 (2) (1886) 8 All. 324
(3) (1902) 26 Mad. 734

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position The income of the property was quite sufficient to maintain the minor

The defendant was not a *bonâ fide* purchaser without notice of the plaintiff's rights This is clear from the fact that when he bought the property he took from Noorbibi an indemnity bond

Jaffer Rahimtulla for the defendant

ROBERTSON, J —*In this suit the plaintiff prays for a declaration* that a certain sale deed of the 19th January 1904, whereby Noor bibi purported to convey certain immoveable property, situate at Ripon Road, to the defendant, is void, that the said deed might be set aside and the plaintiff declared the owner of the whole of the said property, and further, that the defendant be ordered to reconvey the said property to the plaintiff and to deliver up possession He also prays for an account of the rents of the said property since the 19th January 1904

The plaintiff is the son of one Amiruddin, who died in Bombay intestate on the 2nd December 1894 leaving him surviving as his heirs and legal representatives his widow Noorbibi and the plaintiff Amiruddin's brother Tamuzuddin had predeceased him on the 18th day of October 1892 He also died intestate leaving as his heirs and legal representatives his widow Jenaboo and two daughters and his full brother Shaik Amiruddin After the death of the latter, Noorbibi on behalf of herself and her minor son, the plaintiff, filed a suit, being suit No 363 of 1895, against Jenaboo and her daughters for an account of the estate of Shaik Tamuzuddin *In that suit a consent decree was passed on the 30th March 1897, whereby it was declared that the said* Noorbibi and the plaintiff as the heirs of Shaik Amiruddin were entitled to a $\frac{5}{24}$ths share in the estate of the said Tamuzuddin, and that in satisfaction of the said share they were entitled to a sum of Rs 6,505 By that consent decree it was further ordered and declared that Jenaboo on behalf of herself and her daughters should convey the property belonging to the deceased Tamuzuddin situate at Ripon Road to the said Noorbibi on behalf of herself and the plaintiff and that property was to be taken as being of the value of Rs 4,000, and that in addition to that Noorbibi was to be paid on behalf of herself and the minor

son a sum in cash of Rs 2,505 In pursuance of that decree Jenaboo on the 20th November 1897 conveyed to Noorbibi on her own behalf and as guardian of her minor son, the plaintiff, the Ripon Road property, and by a release dated 20th December 1897 Noorbibi acknowledged that the possession of the said Ripon Road property was duly given to her and that the payments directed by the decree, that is, the payment of the said sum of Rs 2,505 had duly been made to her on her own behalf and on behalf of her minor son the plaintiff

It appears that on the 19th January 1904 Noorbibi purported to convey this Ripon Road property on behalf of herself and the minor plaintiff to the defendant for the consideration of Rs 7,000 The plaintiff claims that this conveyance is invalid and that he is entitled to be declared the sole owner of the property

It is admitted on both sides that of the $\frac{6}{24}$ths share of Tamuz uddin's estate the plaintiff was entitled to $\frac{7}{8}$ths and Noorbibi to $\frac{1}{8}$th The plaintiff contends that for the $\frac{7}{8}$ths of the Ripon Road property he is clearly entitled to his decree Mr Jafferbhai contended that under the circumstances and having regard to the rules of the Mahomedan Law Noorbibi had power to convey the plaintiff's interest in the property He admitted that if he could not establish that Noorbibi had that power under the Mahomedan Law he could not succeed in his defence In support of his defence he cited MacNaghten's Moohummudan Law, page 64, paragraph 14, of the 4th edition That says "A guardian is not at liberty to sell the immoveable property of his ward, except under seven circumstances" Only the second of those circumstances was relied upon and that runs as follows —"Where the minor has no other property, and the sale of it is absolutely necessary to his maintenance"

Without stopping to consider whether this passage correctly sets out the law upon the point, it is sufficient to say that there is in this case absolutely no evidence that the sale was in any way necessary to the maintenance of the minor The defendant sought to establish this by suggesting that Noorbibi was entitled first to be repaid the costs of suit No 363 of 1905, which he

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estimated at about Rs 1,000, secondly to be recouped for the maintenance of the plaintiff for fourteen years, which he estimated at Rs 4,000, and thirdly to be repaid the marriage expenses of the plaintiff, which he estimated at Rs 1,000 As to these three items I am asked to rely on conjecture as there is no evidence whatever As to the amount of costs incurred in suit No 363 of 1905 a consent decree was taken No written statement was put in There was apparently no contest As to the maintenance of the plaintiff for fourteen years, Noorbibi was in receipt of all the rents of the Ripon Road property which has been variously estimated at from Rs 60 to Rs 80 per mensem The plaintiff's share of these rents would be amply sufficient for his maintenance As to the marriage expenses of the plaintiff, they were estimated by Munshi Abdul Rehman, the next friend of the plaintiff, to be some Rs 400 or Rs 500 This included ornaments worth Rs 300 which remained in the possession of Noorbibi Under these circumstances I am of opinion that no necessity has been shown for the sale and that the plaintiff has established his right as regards the 7/8ths of the property

This being so it is unnecessary to discuss the question whether the passage cited in Mr MacNaughten's work applies to the case of a *de facto guardian*, or whether it correctly states the law as now applied in this Court see *Baba* v *Shivappa*[1], *Hurbai* v *Hiraji Byramji Shanja*[2], *Moyna Bibi* v *Banku Behari Biswas*[3]

As regards the remaining 1/8th the position is somewhat different The defendant contends that Noorbibi being legally entitled to 1/8th of the property, the conveyance of the 19th January 1904 was effective at any rate so far as her 1/8th is concerned He asserts in his written statement that he was a *bona fide* purchaser without notice Now, as to this it is clear that he had notice of the trust That appears clearly from the conveyance by Jenaboo to Noorbibi of the 20th November 1897 which was handed over to the 1st defendant at the date of the conveyance It would also appear from the indemnity bond

(1) (1895) 20 Bom 199 (2) (1895) 20 Bom 116.
(3) (1907) 29 Cal. 473

passed on the same date (that is the 19th January 1904) that the 1st defendant was, at *that* time in extreme doubt as to the validity of the conveyance of this property to him by Noorbibi That being so, I see no reason why I should not give full weight to the express admission of the 1st defendant made in answer to a question put by his own Counsel The question which was put to him was this "At the time of the execution of exhibit B were you aware that Noorbibi had appropriated to her own use a sum of Rs 2,505 and the other property of Tamuzuddin and Amiruddin?" His answer was "Yes I was aware of this" His Counsel then asked liberty to repeat the question and the question was repeated twice and fully explained to the witness He again answered "Yes, I knew it" No further questions were then asked by his Counsel, nor was the permission of the Court asked to put further questions It is, therefore, impossible to hold that the 1st defendant was a *bonâ fide* purchaser without notice of the trust and secondly of its breach

If that is so, then it only remains to consider what is the position of a purchaser for full value who has notice of the trust and of its breach The rule is laid down in these terms in Lewin on Trusts, 10th edition, page 1045[1] —"But if the alienee be a *purchaser* of the estate at its full value then if he take with *notice* of the trust he is bound to the same extent and in the same manner as the person of whom he purchased" Of the authorities referred to by Mr Lewin, it is only necessary to refer to one *Mackerth* v *Symmons*[2] In *Dunbar* v *Tredennick*[3] Lord Chancellor Manners lays down the rule thus —'Why then what is the situation of a purchaser with notice of a fraudulent title? It certainly may be stated as a general proposition, that a purchaser with notice, is, in equity, bound to the same extent, and in the same manner, as the person from whom he purchased, or as Lord Rosslyn states it in *Taylor* v *Stibbert*[4] —'If he is a purchaser with notice, he is liable to the same equity, stands in his place, and is bound to do that which the person he represents, would be bound to do by the decree''

(1) 1 th Edn. p 1100

(2) (1808) 15 Ves 3 9 at p 350

(3) (1815) 2 Ball & B 301 at p. 310

(4) (1791) 2 Ves Jun 437 at p. 439

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That same rule has been applied in the case of *Manchar Sorabji Chulla* v *Kongseoo* (1) Sir Richard Cou says "The established doctrine of Courts of Equity is, th if a purchaser of an estate at its full value takes with noti of a trust, he is bound to the same extent and in the sar manner as the person of whom he purchased'

It remains, therefore, only to consider what was the positic of Noorbibi at the date of its conveyance It appears th Noorbibi, to use the words of the defendant himself, appr *priated to her own use Rs 2,505 paid to her under the consen* decree on behalf of herself and the plaintiff I take it, ther fore, as clear having regard to the fact that her share in th whole of the Rs 6,505 awarded to her and the plaintiff l consent decree amounted to only Rs 813, that she having appr priated the whole of the Rs 2,505 to herself held the whole of th Ripon Road property, which was valued at Rs 4,000, on beha of the plaintiff Assuming for a moment that the value of th Ripon Road property is to be taken at Rs 7,000, her share o that would only come to some Rs 870 and her share of Rs 2,50 to about Rs 310 making Rs 1,180 altogether If, therefore, it assumed that Noorbibi took this Rs 1,180 out of the Rs 2,50 as representing her share of the Rs 2,505 plus her share of th Ripon Road property, there still remains a balance of Rs 1,42 which as between her and the plaintiff Noorbibi was liable t make good to the trust at the date of the sale to the defendant

But the Courts in England have gone further and have held that under such circumstances the sale by a trustee of his share in joint property in breach of trust to a purchaser who takes with notice of a trust is wholly void In the case of *Bourson* v *Savage* (2) the facts were as follows —One of the three trustees executed an assignment of leasehold property held jointly by them to a purchaser and forged the signatures of his two co-trustees, and also the requisite assent of the *cestui que trust* to the sale The trustee was a solicitor and acted as such on behalf of the purchaser It was held that the circumstances attending the transaction

(1) (1869) 6 Bom H. C. O. C J 59 (2) (1866) L. R 2 Eq 134

were sufficient to affect the purchaser with notice of some trust, if not the actual nature of it, and that he had constructive notice of the trust through the knowledge of the trustee who was his solicitor But it was also held, further that though the execution by one of the three joint tenants was a valid assignment of the legal interest in one-third to the purchaser, the actual and constructive notice of the trust disentitled him to the beneficial interest, and a reconveyance was ordered In his judgment Kindersley, V C, says "Being of that opinion, I cannot hesitate to conclude that *quoad Boursot and Stone* (the two trustees) the deed of assignment has no operation whatever But as *Holmes* (that is the fraudulent trustee) actually executed, I think the effect of this deed of assignment was to vest the legal interest of one third of the leasehold property in the defendant Assuming then that the legal interest in one third of the property passed to *Savage* by the assignment, how is it as to the beneficial interest in that one third?" He then discusses the evidence and comes to the conclusion that the defendant had actual notice of the existence of the trust sufficient to put him upon inquiry and that as he had completed the purchase without making any inquiry, he could not maintain it against the real owners And he closes his judgment by saying "It appears to me, therefore, that even on the ground of actual notice, and at all events on the ground of constructive notice, *Savage* (the defendant) cannot maintain a right to the beneficial interest even of the one third which was assigned to him by *Holmes*"

On both these grounds, it appears to me that the plaintiff is entitled to the relief he claims in respect not only of the ⅞ths of the property, which admittedly belonged to him, but also in respect of the ⅛th of the property which originally belonged to Noorbibi

It only remains to record my findings on the issues As to the 1st issue, no finding is necessary

2 In the affirmative

3 As to the first part I do not think it is necessary to record any definite finding It is sufficient to say that the evidence

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regarding the execution of the mortgage is very defective As regards the second part of the issue, I am of opinion that there is no evidence whatever that the real intention of the mortgage was to raise money for executing repairs to the property or that any such repairs were in fact executed by Noorbibi

4. I am of opinion that at the date of the sale to the defendant Noorbibi had no share of her own in the property in suit

5 I am of opinion that she had no power to sell

6 I find that the defendant had notice and was not a *bonâ fide* purchaser

7 I find that Noorbibi had appropriated to her own use the sum of Rs 2,505 mentioned in paragraph 7 of the plaint and she thereby committed a breach of trust

8 I find in the negative for the reasons already given in deciding the 3rd issue

9 I find in the negative

10 It is unnecessary having regard to my decision to find on this issue but if it had been necessary I should find in the affirmative

There must be a decree for the plaintiff in the terms of prayers (a), (b) and (c) to the prayer of the plaint

The Commissioner to take an account of the rents received by the defendant since the 19th January 1901

The defendant must pay the costs of this suit and of the reconveyance

Attorneys for the plaintiff Messrs *Ardeshir Hormusji and Dinsha*

Attorneys for the defendant Messrs *Thakordas and Co*

Suit referred to the Commissioner

F N L.

CRIMINAL JURISDICTION

SPECIAL TRIBUNAL UNDER ACT XIV OF 1908.

Before Sir Basil Scott Kt Chief Justice Mr Justice Chandavarkar and Mr Justice Heaton

EMPEROR v VINAYAK DAMODAR SAVARKAR AND OTHERS * 1910 October 6

Effect of illegal arrest on trial of accused—Criminal Procedure Code (Act V of 1898), section 188[1]—Extradition

Where a man is in the country and is charged before a Magistrate with an offence under the Penal Code it will not avail him to say that he was brought there illegally from a foreign country

The principle upon which English cases to this effect are based underlies also section 188 of the Criminal Procedure Code (Act V of 1898)

ONE Vinayak Damodar Savarkar and 37 other accused, charged with conspiracy under sections 121, 121A, 122 and 123 of the Indian Penal Code, were committed for trial before a Special Bench constituted under the Criminal Law Amendment Act (XIV of 1908) Savarkar, who had been arrested in England and brought out to India under the Fugitive Offenders Act 1881, stated that he had escaped from police custody at Marseilles and had been recaptured Relying on the fact of his having set foot in France, he now claimed the asylum of that country, and, contending that the Court has no jurisdiction over him, took no further part in the trial

The Court declined to discuss matters connected with international law and the trial proceeded against all the accused jointly

* Special Bench cases Nos 2 3 and 4 of 1910

(1) Section 188 of the Criminal Procedure Code (Act V of 1898) runs as follows — When a Native Indian subject of Her Majesty commits an offence at any place without and beyond the limits of British India or when any British subject commits an offence in the territories of any Native Prince or Chief in India he may be dealt with in respect of such offence as if it had been committed at any place within British India at which he may be found Provided that no charge as to any such offence shall be inquired into in British India unless the Political Agent if there is one, for the territory in which the offence is alleged to have been committed certifies that in his opinion the charge ought to be inquired into in British India, and, where there is no Political Agent, the sanction of the Local Government shall be required

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In the course of the hearing, however, questions were put in the cross examination of a police witness *with the object of showing that the rearrest* of Savarkar at Marseilles was illegal and that the Court had no jurisdiction over him and that, therefore, the other accused could not be tried jointly with him The point as to the relevance of the illegality (if any) of the rearrest was therefore argued, and for the purposes of the argument it was assumed that the rearrest had, in fact, been illegal

Jardine, Acting Advocate-General, with *Weldon, Velinkar* and *Nicholson* for the Crown

The *accused has been "found" in British India* within the meaning of section 188 of the Criminal Procedure Code

In *Empress* v *Maganlal*[1] the same word, in the Foreign Jurisdiction and Extradition Act (XXI of 1879), was held to mean "actually present" That case followed *The Queen* v *Lopez*[2] In *Muhammad Yusuf ud din* v *Queen Empress*[3] the Privy Council expressly precluded themselves from laying down any law as to what would be the consequences of the arrest therein There was no desire to press the case, and the only question they had to decide was as to the illegality of the arrest, not as to the illegality of the proceedings consequent on the arrest That case was considered in *Sobha and Baggu* v *Queen Empress*[4] See also "Cockburn, C J's charge to the Grand Jury in the case of *Queen* v *Nelson and Brand* ' Again in *Emperor* v *Ravalu Kesigadu*[5] it was held that the question whether the officer who effected the arrest was acting within or beyond his powers did not affect the question of whether the accused was guilty or not of the offence charged

Baptista for certain of the accused

Section 188 does not apply, although sanction was given under it It only applies to cases where the offence has been committed outside British India See *Queen Empress* v *Ganpatrao Ram*

(1) (1887) 0 Bom 0.2 (3) (1897) L. R 24 I A 137

(2) (1858) 27 L. J M. C. 43 (4) (1879) P R No 6 of 1879 Cr

(5) (1902) 26 Mad 124

chandra[1] Again the word "found" may be taken to mean "actually present," but not "illegally arrested and brought by force" *Empress* v *Maganlal*[2] was entirely based on English decisions they do not apply here On the other hand the Privy Council in *Yusuf ud din's* case[3] held the arrest illegal and quashed the proceedings on that ground *Dixon* v *Wells*[4] implies that the important question is whether the accused has protested against the jurisdiction at the outset

Counsel further pressed arguments based on a contention that the enquiry had been entered upon before sanction given under section 188

SCOTT, C J —The accused Vinayak Damodar Savarkar was committed to this Court by Mr Montgomerie, First Class Magistrate of Nasik, for trial upon charges framed under sections 121, 122 and 123 of the Penal Code At the commencement of the trial here the accused said that he would take no part in the trial but asked for an adjournment and for facilities to make to the British and to the French Governments representations regarding what he contended was his illegal arrest in Marseilles after he had escaped from the custody of police officers charged with the duty of bringing him from England to Bombay His application was refused on the ground that it was beyond the province of this Court to do anything more than try him for the offences in respect of which he had been committed for trial The trial then proceeded against him and other accused jointly charged with him After certain witnesses had been examined Mr Baptista appearing for certain of the accused wished to put questions to one of the police witnesses regarding the escape and rearrest of Vinayak at Marseilles with a view to show that the rearrest was illegal and with the intention of contending thereon that the trial of Vinayak was without jurisdiction and that, if so, the trial could not proceed against the prisoners charged jointly with him

The Court upon this heard arguments as to what would be the effect on the trial of proof that the arrest was illegal

(1) (1891) 19 Bom. 10.
(2) (1882) 6 Bom. 622
(3) (1897) L. R. 24 I A 137,
(4) (1890) 25 Q B D 249,

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The learned Advocate General without admitting any of the allegations made regarding the rearrest at Marseilles contended that the circumstances of Vinayak's rearrest were irrelevant.

This contention is, in our opinion, correct. It appears that Mr. Montgomerie, a First Class Magistrate at Nasik, upon a complaint duly authorised under section 196 of the Criminal Procedure Code and sanctioned so far as it concerned offences committed out of India under section 188, issued a warrant directing that Vinayak should be brought to Nasik from Bombay where he was expected to land on or about the 22nd of July 1910 to be dealt with according to law. Vinayak arrived in Bombay as expected having been sent out to India under the Fugitive Offenders Act by a Magistrate in London, and was taken to Nasik under Mr. Montgomerie's warrant. The charges against him were there investigated by Mr. Montgomerie under the procedure prescribed by the Criminal Law Amendment Act, 1908, and he was then committed for trial to this Court as already stated. For the purpose of argument we will assume that Vinayak escaped from custody at Marseilles and was rearrested there by the British Police under circumstances not authorised by the warrant which they held or by section 66 of the Criminal Procedure Code or section 28 of the Fugitive Offenders Act.

The argument based by Mr. Baptista on these assumptions is one which has often been advanced before, but so far as we are aware always without success.

Where a man is in the country and is charged before a Magistrate with an offence under the Penal Code it will not avail him to say that he was brought there illegally from a foreign country. This appears very clearly from Lord Chief Justice Cockburn's charge to the Grand Jury in *The Queen v. Nelson and Brand*.(1) It was held that George William Gordon had been by an illegal and unwarrantable act arrested and conveyed by the Governor and Custos of Kingston in Jamaica to Morant Bay in that island and there placed before a Military Court Martial administering Martial law in Morant Bay, but not in Kingston. The Lord Chief Justice however held that having

(1) Charge to the Grand Jury, Second Edition in the case of Queen v. Nelson and Brand, p. 118.

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been brought within the ambit of Martial law he was liable to be tried under it He said (at pp 118 and 119), "When Mr Gordon was brought within the ambit or sphere of the jurisdiction of Martial law—assuming always on this part of the case, that there was such a jurisdiction—it seems to me that it was not for the parties administering the Martial law to inquire how he had been brought there I will illustrate the matter by a case which has happened before now Suppose a man to commit a crime in this country, say murder, and that before he can be apprehended he escapes into some country with which we have not an Extradition Treaty, so that we could not get him delivered up to us by the authorities, and suppose that an English police officer were to pursue the malefactor, and finding him in some place where he could lay hands upon him, and from which he could easily reach the sea got him on board a ship and brought him to England, and the man were to be taken in the first instance before a Magistrate the Magistrate could not refuse to commit him If he were brought here for trial, it would not be a plea to the jurisdiction of the Court that he had escaped from justice, and that by some illegal means he had been brought back It would be said 'Nay, you are here, you are charged with having committed a crime, and you must stand your trial We leave you to settle with the party who may have done an illegal act in bringing you into this position, settle that with him' So here, although if Mr Gordon had not been put to death, but had been subjected to some minor punishment, some of those scourgings or other things that we have heard of in Jamaica—if he had come to England and had brought an action for damages against Governor Eyre, it may well be that a jury of Englishmen, presided over by an English Judge, would have awarded him exemplary damages for the wrong that had been done him, but that does not affect the question we are now considering, namely, whether, having been brought within the ambit of the Martial law, he was liable to be tried under it I cannot but think that he was"

The report of *In re Parisot*[1] affords two instances in which the same view was taken by the Court upon protests being made

[1] (1889) 5 T L R 344

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by prisoners as to the illegality of their arrests outside the British Island In one case the arrest was in Brussels, in the other in Jersey

In *Ex parte Scott*[1] the alleged illegality of an arrest in Brussels was held to be irrelevant

The principle upon which these cases are based underlies also section 188 of the Criminal Procedure Code which, in that Vinayak, a Native Indian subject, is charged *inter alia* in respect of certain offences committed in London, applies to this case Under that section it has been held in *Empress* v *Maganlal*[2] that a Native Indian subject arrested without a warrant by British Indian Police in a Native State and brought to Ahmedabad was 'found' in Ahmedabad so as to give jurisdiction to the Magistrate at that place This decision followed that of 14 Judges sitting in the case of *The Queen* v *Lopez*[3] where it was held that a man is 'found' for the purposes of criminal jurisdiction under 18 and 19 Vict, c 91, s 21, wherever he is actually present whether or not he has been brought to that place against his will

Mr Baptista has however relied upon the judgment of the Judicial Committee in *Muhammad Yusuf ud-din* v *Queen Empress*[4] as being inconsistent with the case relied upon by the prosecution since the Judicial Committee held that an arrest of a Hyderabad subject at a station on a railway line in the Hyderabad State over which the Queen Empress had no general criminal jurisdiction was illegal and advised Her Majesty that the warrant and arrest and the proceedings thereon should be set aside

It is to be observed however that the Lord Chancellor in delivering judgment was careful to point out that their Lordships were called upon to pronounce their opinion as to the legality of the arrest, but they had nothing to do with the question whether or not if the accused had been found within British Territory he could have been lawfully tried and convicted, nor with the consequences of the arrest being lawful or otherwise The judgment does not purport to deal with the question whether an illegal arrest in foreign territory vitiates an inquiry by a Magistrate

(1) (1829) 9 B & C 446
(2) (1882) 6 Bom 622
(3) (1858) 27 L J M C 48
(4) (1897) L R 24 I A 137

into an offence against Indian Penal Code charged against the person arrested when brought before the Court, nor does it appear from the report that the question was argued That has therefore no bearing upon the question now under consideration

For the above reasons we hold that both under section 185 of the Criminal Procedure Code as regards offences committed in London and apart from that section as regards offences committed in British India neither the jurisdiction of the Magistrate to inquire into the case, nor the jurisdiction of this Court to try it, can be affected by any illegality in connection with the rearrest of Vinayak which may have occurred at Marseilles

K McI K.

APPELLATE CIVIL

Before Mr Justice Batchelor and Mr Justice Rao

SOMANA BASAPPA (ORIGINAL PLAINTIFF) APPELLANT, v. GADIGEVA KORNAYA (ORIGINAL DEFENDANT) RESPONDENT * 1910. *November 15*

Evidence Act (I of 1872) section 92 proviso I—Dekkhan Agriculturists Relief Act (XVII of 1879) section 10A[1]—Redemption suit—Sale in reality a mortgage—Evidence of oral agreement varying the written document

The plaintiff brought a redemption suit under the provisions of the Dekkhan Agriculturists Relief Act (XVII of 1879) alleging that the deed which he had

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* First Appeal No 215 of 1909

(1) Section 10A of the Dekkhan Agriculturists Relief Act (XVII of 1879)—

10A Whenever it is alleged at any stage of any suit or proceeding to which an agriculturist is a party that any transaction in issue entered into by such agriculturist or the person if any through whom he claims was a transaction of such a nature that the rights and liabilities of the parties thereunder are triable wholly or in part under this chapter the Court shall, notwithstanding anything contained in section 92 of the Indian Evidence Act 1872 or in any other law for the time being in force have power to inquire into and determine the real nature of such transaction and decide such suit or proceeding in accordance with such determination and shall be at liberty, notwithstanding anything contained in any law as aforesaid to admit evidence of any oral agreement or statement with a view to such determination and decision

Provided that such agriculturist or the person, if any through whom he claims was an agriculturist at the time of such transaction:

Provided further that nothing in this section shall be deemed to apply to any suit to which a *bonâ fide* transferee for value without notice of the real nature of such transaction or his representative is a party where such transferee or representative holds under a registered deed executed more than twelve years before the institution of such suit

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executed to the defendant, though on its face a deed of sale, was in reality only a deed of mortgage, the defendant having promised at the time of the execution of the deed that he would allow redemption on payment of the money advanced The defendant replied that the transaction was sale

The First Class Subordinate Judge of the Dharwar District to which section 10A of the Dekkhan Agriculturists Relief Act (XVII of 1879) was not extended found on the evidence that the deed passed by the plaintiff was not proved to be really a mortgage and dismissed the suit

The plaintiff appealed urging that the proper issue in the case was as to whether the sale deed was not obtained or induced by the defendant by means of fraud or misrepresentation within the meaning of proviso I of section 92 of the Evidence Act (I of 1872) and prayed for a remand.

Held, confirming the decree, that the plaintiff sought to make a new case in appeal in so far as he endeavoured to base his case, not upon a separate oral agreement but upon some fraud which would invite the application of proviso I of section 92 of the Evidence Act (I of 1872)

Held, further that in the districts to which section 10A of the Dekkhan Agriculturists Relief Act (XVII of 1879) was not extended, it was not open to the Court to enter upon a defence which consisted of an allegation of an oral agreement varying the written contract

Dagdu v *Nana*[1] and *Sangira Malappa* v *Ramappa*[2], followed

Balkishen Das v *W F Legge*[3] referred to

FIRST Appeal from the decision of R G Bhadbhade, First Class Subordinate Judge of Dharwar, dismissing Original Suit No 883 of 1908

The plaintiff sued to redeem the lands in suit under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) alleging that he passed the deed in the form of sale on the promise of the defendant that he would treat the transaction as mortgage

The defendant answered that the transaction was sale and not mortgage

One of the issues raised by the Subordinate Judge on the pleadings of the parties was, "Is the sale-deed passed to defendant proved to be really a mortgage redeemable on the terms stated in the plaint?" The Subordinate Judge after having reviewed all the evidence and the circumstances and

(1) (1910) 35 Bom 93 (2) (1909) 34 Bom 59

(3) (1899) 22 All 149

having regard to the fact that section 10A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) was not made applicable to the Dharwar District, found the issue in the negative and dismissed the suit In support of his decision the Subordinate Judge relied on *Balkishen Das* v *W F Legge*[1] and *Dattoo* v *Ramchandra*[2]

The plaintiff appealed

Branson with *Nilkant Atmaram* for the appellant (plaintiff) — The issue raised by the Subordinate Judge was not the proper issue in a case like the present The case should be remanded after framing a proper issue Our case is that the simultaneous promise on the part of the defendant to reconvey on repayment without any intention of fulfilling it was a misrepresentation and proviso I of section 92 of the Evidence Act becomes applicable In the absence of such promise the plaintiff would not have executed the document We rely on *Abaji* v *Laxman*[3] The question of fraud should have been considered

Coyaji with *G S Mulgaokar* for the respondent (defendant) — The frame of the issue in the lower Court was correct Fraud was not alleged either in the plaint or in the plaintiff's deposition The Subordinate Judge was at first under the impression that section 10A of the Dekkhan Agriculturists' Relief Act was extended to the Dharwar District He, therefore, recorded all the evidence which the parties had to adduce in the case The plaintiff executed the deed fully knowing that the transaction was sale, therefore, no evidence can be admitted to prove that the transaction was of a different nature *Sangira Malappa* v *Ramappa*[4], *Dagdu* v *Nama*[5]

BATCHELOR, J —The plaintiff here sued to redeem certain lands under the provisions of the Dekkhan Agriculturists' Relief Act, alleging that a deed (exhibit 16) which he had executed to the defendant, and which is on its face a deed of sale, was in reality only a deed of mortgage, the defendant having promised at the time of the execution of the deed that he would allow the lands

(1) (1899) 22 All. 149
(2) (1905) 30 Bom 119
(3) (1906) 30 Bom 426
(4) (1909) 34 Bom 59
(5) (1910) 35 Bom 93

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concerned to be redeemed on payment of the money advanced The defendant *inter alia* replied that exhibit 16 was in fact, what it is in appearance, a deed of sale

The learned Judge of the Court below framed upon this point the second issue, which is in these terms "Is the sale deed passed to defendant proved to be really a mortgage, redeemable on the terms stated in the plaint?" On that issue the Judge went into all the evidence tendered, and found the issue in the negative

It is now urged for the appellant, who was the plaintiff in the Court below, that the frame of this issue is incorrect, and that we should remand the case for a decision upon a reformed issue as to whether exhibit 16 was obtained or induced by the defendant by means of fraud or misrepresentation, within the meaning of proviso I of section 92 of the Indian Evidence Act

The only question before us is whether the suit should be remanded for retrial upon the suggested issue or not We are of opinion that it should not be remanded As we have said, the learned First Class Subordinate Judge went into all the evidence which was tendered before him on the case which the plaintiff then set up That case, as the judgment shows, was based upon the applicability of section 10A of the Dekkhan Agriculturists' Relief Act, a section which has been subsequently added to that statute, with a view of getting rid of the difficulty created by section 92 of the Evidence Act It was afterwards discovered, during the hearing, that section 10A of the Dekkhan Agriculturists' Relief Act had not been extended to the district from which the suit came That, however, was the plaintiff's case, as it was made before the trying Court, and it seems to us that the plaintiff is now seeking to make a new case in so far as he endeavours to base his case, not upon a separate oral agreement, but upon some fraud which would invite the application of proviso I to section 92 of the Evidence Act

The material portion of the plaint upon this point is para 2 which is in these terms

"Plaintiff having hypothecated in writing the said lands as mentioned above to the defendant, about the 17th day of April 1905 A D, asked the defendant to take in writing a possessory

mortgage of the said lands and on the security of the said lands to advance more money to him as the plaintiff was dunned for payment by creditors to whom sundry debts were due The said defendant replied that he would advance more money if a sale-deed were given in writing and that he would surrender the lands when the principal is paid by making an account on the basis that the sale deed was a possessory mortgage deed Accordingly having made an oral agreement that the lands should be surrendered when the principal and interest were paid on making an account, defendant made as he liked an account of the principal and interest in respect of the dealings and the defendant told me that he would advance to me a further loan of Rs 1,100 and took from me a registered deed of sale intended to be treated as a deed of mortgage for the total amount of Rs 6,500

That is how the plaintiff put his case in the plaint In his deposition, which is exhibit 14, he puts it in the same way by saying "defendant promised to allow redemption in the presence of the writer and the witnesses to the deed" The plaintiff's case then was that he signed the deed (exhibit 16) knowing it to be a deed of sale but that there was at the same time an "oral agreement" made by the defendant that the defendant would treat it as a mortgage and he (the plaintiff) relied upon that "oral agreement" There was no allegation of any fraud or other circumstance which would invalidate the agreement

It seems to us that upon these facts the case falls within the prohibition enacted by section 92 of the Evidence Act, which in such a case forbids the reception of evidence of any oral agreement or statement for the purpose of contradicting, varying, adding to, or subtracting from the written terms of the contract

It may be that upon this point the earlier cases are somewhat difficult to reconcile, but the law has recently been discussed by this Bench in two decisions where previous rulings are examined These two cases are *Digdu* v *Nama*[1] and *Sangira Malappa* v *Ramappa*[2] We follow these decisions which in our view correctly interpret section 92 of the Evidence Act, as expounded by the Judicial Committee in the case of *Balkishen Das* v *W F Legge*[3]

(1) (1910) 35 Bom 93 (2) (1909) 34 Bom 59 (3) (1899) 22 All. 149

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It seems to us that under the law, as it stands in such cases as this, it is not open to the Court to enter upon a defence which, in substance, consists of an allegation of an oral agreement varying the written document, and if it is the desire of the Legislature that such defences which are of a very common occurrence in these cases, should be investigated and decided by the Courts, then the only course to secure that end is to extend section 10A of the Dekkhan Agriculturists Relief Act to the districts where it is desired that the Court's powers in this respect should be enlarged

For these reasons we affirm the decree under appeal and dismiss the appeal with costs

Decree confirmed

G B R

CRIMINAL APPELLATE

Before Mr Justice Batchelor and Mr Justice Rao

EMPEROR v KALEKHAN SARDARKHAN *

1910 November 17

Bombay District Municipal Act (Bombay Act III of 1901) section 96†—Municipality—Permission of the Municipality—Building a wall which had fallen down—Absence of permission—Material reconstruction—Erecting a building

The accused applied to the Municipality on the 19th April 1910 for leave to reconstruct a wall of his house which had fallen down Under sub section 4

* Criminal Appeal No 391 of 1910

† The material portion of section 96 runs as follows —

96 (1) Before beginning to erect any building or to alter externally or add to any existing building or to reconstruct any projecting portion of a building in respect of which the Municipality is empowered by section 92 to enforce a removal or set back the person intending so to build alter or add shall give to the Municipality notice thereof in writing

(5) Whoever begins or makes any building or alteration or addition without giving the notice required by sub section (1) or without furnishing the documents or affording the information above prescribed or except as provided in sub section (4) without awaiting or in any manner contrary to, such legal orders of the Municipality as may be issued under this section or in any other respect contrary to the provisions of this Act or of any by law in force thereunder, shall be punished with fine which may extend to one thousand rupees

of section 96 of the Bombay Municipal Act (Bombay Act III of 1901) the Municipality had one month within which to make known their decision and on the 13th May they issued an order to the accused prohibiting him from making the reconstruction. In the meanwhile on the 11th May the accused reconstructed the wall. He was therefore, prosecuted under section 96 of the Act for having reconstructed the wall without the permission of the Municipality but the Magistrate relying on the case of *Queen Empress* v. *Tippana*[1] acquitted him. On appeal:—

Held, reversing the order of acquittal, that the accused had erected a building within the meaning of section 96 of the Bombay District Municipal Act, 1901 since the rebuilding of the whole wall which had fallen down was a material reconstruction or an erection of a building as defined in the explanation to the section.

Queen Empress v. *Tippana*[1] is not an authority under the new Act.

APPEAL by the Government of Bombay from an order of acquittal passed by Laxmishankar P., Magistrate of the Third Class, Surat.

The accused was the owner of a house within the Municipal limits of the town of Rander, in the Surat District. In February 1910, a *kachha* wall of the house had fallen down, to reconstruct which he applied to the Municipality of Rander, for permission under section 96 of the Bombay District Municipal Act (Bombay Act III of 1901), on the 19th April 1910.

On the 11th May 1910, the accused, without waiting for the permission of the Municipality, reconstructed the *kachha* wall.

The Municipality however informed the accused on the 13th May 1910 that they were unable to grant him the permission sought.

On these facts the accused was prosecuted under section 96 of the Bombay *District Municipal Act* (Bombay *Act III* of 1901) in that he rebuilt the wall without permission from the Municipality.

The trying Magistrate relying on the ruling in *Queen Empress* v. *Tippana*[1] acquitted the accused.

(1) (1888) Ratanlal's Un. Cri. Ca. p. 403.

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The Government of Bombay appealed against the order of acquittal to the High Court

L A Shah, Acting Government Pleader, for the Crown

No one appeared for the accused

BATCHELOR, J —The respondent here was prosecuted under section 96 of the Bombay District Municipal Act (Bombay Act III of 1901), for that he erected a new building without permission from the Municipality and without waiting one month for the Municipality to pass orders in his case

There is no dispute about the facts which are these —The wall of the respondent's house had fallen down and under section 96 of the Act he made an application to the Municipality for leave to reconstruct it That application was dated the 19th April 1910 Under sub section 4 of section 96 the Municipality have one month within which to make known their decision, and on the 13th of May they issued an order to the respondent prohibiting him from making the reconstruction which he desired The reconstruction had however been made before the 13th of May The Magistrate acquitted the accused solely on the authority of the ruling in *Queen Empress* v *Tippana*(1) and the only question before us is whether that decision governs the present case We think that it does not That was a decision passed under section 33 of the Bombay District Municipal Act of 1873, which section differs in material particulars from section 96 of the existing Statute By sub section 7 of section 3 of the present Act "building" is defined to include walls, and by clause (*a*) appended to the explanation of section 96, the expression "to erect a building" includes any material reconstruction of a building Here the whole wall had fallen down and was rebuilt That therefore was a material reconstruction or an erection of a building That being so, it was obligatory upon the accused under section 96 of the Act not to erect this building before receiving the Municipality's orders, or without waiting for those orders as prescribed in the section

(1) (1898) Ratanlal's Un Cri. Ca p 402

The accu ed, therefore, has infringed the law laid down in the section, and we must reverse his acquittal and convict him under section 96, sub section 5 It is not desired to inflict any severe punishment upon the accused, the object of the present appeal being merely to establish the principle We direct that the accused pay a fine of one (1) rupee

1910

EMPEROR v KALLEKHAN SARDAR KHAN

Acquittal set aside

R R

APPELLATE CIVIL

Before Sir Basil Scott Kt Chief Justice and Mr Justice Batchelor

BALAMBHAT BIN RAVJIBHAT AND OTHERS (JUDGMENT DEBTORS), APPELLANTS v VINAYAK GANPATRAV PATVARDHAN (JUDGMENT CREDITOR), RESPONDENT *

1911 *January* 11

Landlord and tenant—Forfeiture clause contained in a decree—Execution proceeding—Power of the Court to grant relief

The principle that Courts of equity will not forego their power to grant relief against forfeiture in the case of non payment of rent where the relations of the parties are those of landlord and tenant merely on the ground that the agreement between them is embodied in a decree of the Court applies alike to a suit to enforce a decree and to proceedings in execution

Krishnabai v *Hari*(1) explained

SECOND appeal from the decision of V N Rahurkar, First Class Subordinate Judge of Satara with appellate powers, confirming the order passed by G G Nargund, Subordinate Judge of Tasgaum, in an execution proceeding

Plaintiff Vinayak Ganpatrav brought a suit against his tenants Balambhat bin Ravjibhat and others to recover possession of certain lands A decree was passed on the 24th September 1896 in accordance with the terms of a compromise arrived at between the parties and contained the following provisions —

1 As to the lands in dispute, namely * * * the defendants are to do the vahivat thereof as stated below in perpetuity from generation to generation

* Second Appeal No 230 of 1910

(1) (1906) 31 Bom 1

1911

BALAMBHAT
v
VINAYAK GANPATRAV

by the right of 'Miras' and for that they should give to the plaintiff Rs 100 from the year 1896 97 every year in perpetuity agreeably to what is stated below in proportion to the lands held by each person As regards the above mentioned sum of Rs 100 which are to be paid by the defendants to the plaintiff they may pay the same either to the plaintiff himself and send it through Post Office by money order to be paid to him or pay the same into Court

2 Agreeably to what is stated in the map of the lands produced with application No 73 and in the schedule annexed thereto the defendants should carry on the vahivat of their respective lands and pay the respective amounts written against their names to the plaintiff

* * * * * * *

The defendants abovenamed are to carry on the vahivat of the pieces of land written against their respective names and pay in two instalments respectively the Government assessment amount written against their respective names to the plaintiff and pay the 'Swamitwa' (i e ownership) dues in the month of August

3 Should the defendants fail to pay the Government assessment amounts and the 'Swamitwa' amounts to the plaintiff agreeably to what is stated in clause 2 the plaintiff must wait till the end of August and if the defendants or their heirs fail to pay the moneys even within that time, the plaintiff shall take into his possession the lands written against the names of those defendants who may not have paid the amounts and make the vahivat thereof himself

* * * * * * *

8 Should the defendants fail to pay the Government dues in time the Government will take the same from the plaintiff on account of the Government not having received it in time if the plaintiff is required to pay more moneys, the same should be paid by the defendants Nos 1 4 5 6, 7 9 10 11 12 14, 16, 17, 18, 20 to the plaintiff

The defendants having made a default in the payment of the assessment, namely, Rs 64-13, and rent, namely, Rs 35 3, in all Rs 100 for the year 1905 06 by the end of August 1906, the plaintiff sought to recover possession of the lands in execution of the decree

The defendants answered that as there was famine in the year 1905 06 they applied to the Court to grant them time and the application was granted by the Subordinate Judge so far as the amount of the assessment was concerned, that in appeal by the plaintiff the order of the Subordinate Judge was reversed and that the defendants, thereupon, immediately paid the amount in

Court The plaintiff was, therefore, not entitled to recover possession

The Subordinate Judge found that the default in payment at the time fixed for it by the decree worked forfeiture under the terms of the decree and that the plaintiff was entitled to recover possession He, therefore, disallowed the defendants' contention and ordered warrants to issue for the delivery of possession to the plaintiff In his order the Subordinate Judge cited the following rulings *Krishnabai* v *Hari Govind*[1], *Balprasad* v *Dharnidhar*[2], *Balkrishna Bhalchandra* v *Gopal Raghunath*[3], *Shirekuli Timapa* v *Mahablya*[4]

The defendants appealed and while the appeal was pending, the plaintiff refunded to the Court of the Subordinate Judge all the amounts which he had received for payments for the year 1905 06 and subsequent thereto on the ground that the said amounts were withdrawn from the Court under some misunderstanding The Appellate Court found that the plaintiff did not waive the forfeiture by acceptance of overdue rent and that the forfeiture could not be relieved against in execution proceeding The Court, therefore, confirmed the order on the following grounds —

The assessment portion of the rent for 1905 06 was not paid in August 1906 and hence the plaintiffs filed their application on 11th February 1908 to enforce the forfeiture

On the 16th July 1906 the defendants applied to the Court of first instance for an enlargement of the time for payment of the assessment and the application was allowed (exhibit 4) Plaintiff appealed against that order and the District Court reversed the order on 5th July 1907 (exhibit 5)

During the pendency of the appeal the defendant paid sums into Court and these were accepted by the plaintiff (exhibit 9 in appeal)

These payments were more than sufficient to pay off the assessment portion of the rent for 1905 06 All these sums with further deposits made by the defendants and received by the plaintiffs were refunded by the plaintiff during the pendency of this appeal (exhibit 9 in appeal)

Mere receipt of an overdue amount does not amount to a waiver (P J for 1898 p 381) As plaintiff appealed against the order (exhibit 4) the payments

(1) (1906) 31 Bom 15
(2) (1886) 10 Bom 437 F N (1)
(3) (1875) 1 Bom 73
(4) (1886) 10 Bom 435

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BALAMBHAT v. VINAYAK GANPATRAY

accepted by him must be presumed to have been accepted under protest Such acceptance cannot amount to a waiver * * *

The case of *Krishnabai v Hari (31 Bom 15) is not in point It can be* distinguished In that case the forfeiture was enforced by an original suit based on the compromise decree In the present the enforcement of forfeiture *is sought in execution The case is governed by the principle laid down in* Balprasad v Dharnidhar (10 Bom 137)

Defendants preferred a second appeal

G S Rao and *D A Tuljapurkar*, for the appellants (defendants)

P P Khare, for the respondent (plaintiff)

SCOTT, C J —In this case we think that the Subordinate Judge with appellate powers was in error in thinking that the case in *Krishnabai* v *Hari*[1] is not in point The *ratio decidendi* in that case is that Courts of equity will not forego their power to grant relief against forfeiture in the case of non-payment of rent where the relations of the parties are those of landlord and tenant, *merely on the ground that the agreement* between them is embodied in a decree of the Court

We think that the ruling applies alike to a suit to enforce a decree and to proceedings in execution

Upon the materials before us we think it is a case in which *the Court in the exercise of its discretion should have refused to* award forfeiture in favour of the plaintiff having regard to the fact that he had already accepted payment of sums more than sufficient to discharge the obligations of the defendants under the decree

We *set aside* the decree of the lower Court and *dismiss* the application of the judgment creditor with costs throughout

Decree reversed

G B R

(1) (1906) 31 Bom 15

APPELLATE CIVIL

Before Sir Basil Scott, Kt, Chief Justice and Mr Justice Batchelor

SOMCHAND BHIKHABHAI AND OTHERS (ORIGINAL DEFENDANTS) APPLICANTS v CHHAGANLAL KHUPCHAND AND ANOTHER (ORIGINAL PLAINTIFFS) OPPONENTS * 1911 *February 7*

Civil Procedure Code (Act V of 1908), section 93—Duties imposed upon Collectors—Duties not to be discharged by subordinate

Duties which are imposed upon Collectors by Government under section 93 of the Civil Procedure Code (Act V of 1908) are of a very special nature, the discharge of which often requires serious consideration and they may not be discharged by the Collector s subordinate

The conclusion that because an Assistant Collector was discharging the functions of the Collector under the provisions of section 11 of the Land Revenue Code (Bom Act V of 1879) in revenue matters he was therefore, entitled to discharge his functions with reference to suits filed under section 92 of the Civil Procedure Code (Act V of 1908) is erroneous

APPLICATION under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) against the order of M B Tyabji, District Judge of Broach, in original suit No 10 of 1910

The plaintiffs filed the present suit in the District Court at Broach under section 92 of the Civil Procedure Code (Act V of 1908) The plaint contained the following endorsement —

Permission is granted under section 92 3 of the Civil Procedure Code

G WILES,
For Collector

10th September 1910

One of the two preliminary objections raised to the plaint was that the certificate to file the suit was not given by the Collector of the District The District Judge overruled the objection for the following reasons —

Secondly, it has been contended that the certificate has in this case been given by Mr Wiles who was Assistant Collector not Collector of this District. It is well known that on the date of the certificate the Collector was too ill to attend to the duties of his post and that Mr Wiles was performing those duties. There is an affidavit to this effect The word Collector is not defined in the Civil Procedure Code

* Application No 2 2 of 1910 under extraordinary jurisdiction.

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SOMCHAND BHIKHABHAI v CHHAGANLAL

The suit relates to property in Broach Mr Wiles was holding charge of the Broach Taluka as Assistant Collector on the date on which he signed the certificate He was besides, carrying on the revenue administration in the circumstances mentioned above As the Collector was disabled Mr Wiles being the only Assistant Collector in the District succeeded temporarily to his office and was legally authorized by sections 10 and 11 of the Land Revenue Code to perform all the duties and exercise all the powers of the Collector, including the power of granting permission to file this suit until the present Collector took charge on the 6th last I therefore overrule the objection and decide the preliminary issue in the plaintiffs favour

The defendants preferred an application under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908), urging that the Assistant Collector Mr Wiles was not the Collector under the circumstances contemplated by section 93 of the Civil Procedure Code (Act V of 1908) and a *rule nisi* was issued requiring the plaintiffs to show cause why the order of the District Judge should not be set aside

G K Parekh for the applicants (defendants) in support of the rule

L A Shah for the opponents (plaintiffs) to show cause

SCOTT C J —This suit was filed in the District Court of Broach ostensibly under the provisions of section 92 of the Civil Procedure Code by certain persons interested in a certain charity property situate within the jurisdiction of that Court Being a suit in the mofussil the consent of the Advocate General was not necessary, provided the consent of a Collector or other officer of the local Government authorized previously by the local Government had been obtained

The plaint bears the endorsement "Permission is granted under section 92 3 of the Civil Procedure Code G Wiles for Collector"

Now the person authorized by Government Resolution to consent to the institution of suits in the District of Broach is the Collector, and Mr Wiles who is the Assistant Collector appears to have made the endorsement on the assumption that the Collector being ill he was entitled to discharge all his functions

The duties which are imposed upon Collectors by Government Resolution under section 93 of the Code are duties of a very special nature, the discharge of which often requires serious consideration and we have not been referred to any authority to justify the argument that where these duties are imposed upon the Collector they may be discharged by his subordinate.

Objection was taken on behalf of the defendants to the suit as not having been authorized by the proper officer. The District Judge, however, came to the conclusion that because Mr. Wiles as Assistant Collector was discharging the functions of the Collector under the provisions of section 11 of the Land Revenue Code in revenue matters, he was, therefore, entitled to discharge his functions with reference to suits filed under section 92 of the Civil Procedure Code.

In our opinion this is an erroneous view, and the learned Judge, in entertaining the suit in face of the objection, acted illegally in the exercise of his jurisdiction. We accordingly order the Judge to reject the plaint under rule 11, order 7, of the Civil Procedure Code. The opponents must pay the costs of this application.

Plaint ordered to be rejected.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

BALKRISHNA WAMNAJI GAVANKAR (ORIGINAL DECREE-HOLDER), APPELLANT, v. SHIVA CHIMA MHATRA AND OTHERS (ORIGINAL JUDGMENT-DEBTORS), RESPONDENTS.* 1911 February

Decree—Execution—Successive applications to execute decree—First darkhast made during the pendency of the previous darkhast—Decision on the first darkhast does not operate as res judicata if a new darkhast filed within time of the disposal of the previous darkhast.

A decree obtained in 1898 was, after three intermediate applications to execute it, sought to be executed in 1903. This application was ordered by

* Second Appeal No. 96? of 190?.

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BALKRISHNA WAMNAJI v. SHIVA CHIMA

the Subordinate Judge to be proceeded with and his order was confirmed on appeal by the District Judge on the 2nd August 1905 In the meanwhile in 1904, the decree holder filed another *darkhast* to execute the decree but it was rejected by the Subordinate Judge as barred by limitation This order was not appealed against The present *darkhast*, filed in 1907, was held to be barred by *res judicata* in virtue of the decision on the *darkhast* of 1904 On appeal —

Held reversing the decision that the right of the decree holder to proceed in execution on the strength of the appellate Court's order in his favour could not be affected by the order of the Subordinate Judge passed in the *darkhast* of 1904 because the latter was the order of a lower Court and it was passed in a *darkhast* which could not have legal validity so long as the *darkhast* of 1903 was kept alive by proper proceedings

SECOND appeal from the decision of F X DeSouza, District Judge of Thana, confirming the order passed by D D Cooper, Subordinate Judge of Bassein

Execution proceedings

The decree under execution was passed on the 22nd March 1898 By 1901 three applications were made by the decree holder to execute it A fourth application (*darkhast*) to execute the decree was presented in 1903 The Subordinate Judge found the *darkhast* in order and ordered execution to proceed This order was, on appeal, confirmed by the District Judge on the 2nd August 1905 On the 10th October 1906 the decree-holder took some steps in the *darkhast* In the meanwhile, in 1904, the decree holder filed a fifth *darkhast* to execute the decree It was rejected by the Subordinate Judge on the 15th June 1905 as having been beyond time This order was not appealed from In 1907 the present *darkhast* was filed The Subordinate Judge rejected it on the ground that it was barred by *res judicata* in virtue of the decision in the *darkhast* of 1904 On appeal, the District Judge confirmed the order The decree holder appealed to the High Court

D A Khare and *B V Desai*, for the appellant

G S Rao and *J R Dhurandhar*, for the respondents

CHANDAVARKAR, J —The present *darkhast* of 1907 has been held by both the Courts below to be barred as *res judicata* by the order of the Subordinate Judge holding the previous

1911

BALKRISHNA WAMNAJI v. SHIVA CHINA

darkhast No 460 of 1904 to be time barred But though that might be so, if this latter *darkhast* and the order thereon by the Subordinate Judge had stood alone, we have here the fact that at the time of that *darkhast* and the order, there was an appeal pending in the District Court against the order in the decree holder's favour directing execution to proceed in *darkhast* No 5 of 1903 That was an appeal preferred by the judgment debtor and the appeal Court upheld the order in the decree-holder's favour on the 2nd of August 1905 The decree holder had under that appellate decree a right subsisting on that date to proceed in execution under that *darkhast* of 1903, and as a matter of fact he did apply to the Court on the 10th of October 1906 That was an application to take a step in aid of execution according to law and it was made within three years immediately preceding the date of the present *darkhast* of 1907 The right of the decree holder to proceed in execution on the strength of the appellate Court's order in his favour could not be affected by the order of the Subordinate Judge's Court passed in the *darkhast* of 1904 because the latter was the order of a lower Court and it was passed in a *darkhast* which could not have legal validity so long as the *darkhast* of 1903 was kept alive by proper proceedings Therefore, the order appealed against is set aside and the Subordinate Judge is directed to allow execution in the *darkhast* of 1907 The respondent must pay to the appellant the costs throughout of this *darkhast*

Order set aside

R R

APPELLATE CIVIL

Before Sir Basil Scott, Kt, Chief Justice, and Mr Justice Batchelor

1911 *February 7*

BAI GANGA, WIDOW OF SADARAM PRANJIVAN (ORIGINAL DEFENDANT), APPELLANT, v RAJARAM ATMARAM (ORIGINAL PLAINTIFF) RESPONDENT *

Civil Procedure Code (Act V of 1908), Order XXXIV, Rule 14—Transfer of Property Act (IV of 1882) section 99—Repeal—Decree on mortgage—Execution sale—Proceeds insufficient to satisfy decree—Attachment of mortgagor's other property comprised in redemption decree for the recovery of the balance—Property attached to be sold

H and G mortgaged their property *A* to R who also held in mortgage from the same mortgagors their other property *B* R obtained a decree on the mortgage of property *A* for the recovery of the mortgage debt by sale of that property and the balance if any to be paid by the mortgagors Subsequently the mortgagor G, H having died in the meanwhile got a redemption decree against R with respect to property *B* In execution of R s decree, property *A* was sold but the sale proceeds were not sufficient to satisfy the decretal debt. R thereupon, sought to recover the balance by execution against property *B* and the said property was attached After attachment a question having arisen as to whether R could recover the balance of his decree by sale of property *B* in execution without instituting a suit for the sale of that property,

Held that the Civil Procedure Code (Act V of 1908) in so far as it repealed section 99 of the Transfer of Property Act (IV of 1882) and substituted in its place Order XXXIV Rule 14 merely effected a change of procedure in the manner in which mortgaged property has to be realized in execution of money decrees and therefore the statutory rule in force for the purpose of the execution of the unsatisfied portion of the decree on mortgage was the rule contained in Order XXXIV of the Civil Procedure Code (Act V of 1908) R was therefore entitled to an order that the attached property *B* be sold in execution of his decree with respect to property *A*

SECOND Appeal from the decision of M B Tyabji, District Judge of Broach, reversing his own decree in Appeal No 52 of 1909 and modifying the order passed by B N Shah Subordinate Judge of Ankleshvar, in an execution proceeding, Darkhast No 869 of 1909

One Harishankar Sadaram and his mother Bai Ganga mortgaged their land *A* to Rajaram Atmaram for Rs 999 under a

* Second Appeal No 563 of 1910

mortgage-deed, dated the 3rd November 1893 The said mortgagors also passed another mortgage deed to the same mortgagee on the 8th June 1894 *mortgaging their land B for* Rs 599 The mortgagee Rajaram Atmaram brought a suit, No 509 of 1896, on the mortgage of property *A* The decree in the suit was passed on the 5th June 1897 It directed the defendants to pay to the plaintiff, on the 5th December 1897, Rs 1,261 costs and interest Rs 164 10 4, and also provided for a personal remedy The mortgaged property *A* was sold in execution of the decree and Rs 960 were realized by the sale, and to secure the balance the mortgagee made several applications and got some properties of the mortgagors sold

In the year 1905 one of the mortgagors, Bai Ganga, the other mortgagor Harishankar having died in the meanwhile, filed a suit, No 330 of 1905, against the mortgagee for the redemption of the property *B* and obtained in appeal an instalment decree, dated the 8th January 1908 directing that the plaintiff should pay to the defendant the mortgage debt by annual instalments of Rs 75 each

In August 1908 the mortgagee presented a Darkhast No 859, for the execution of the decree of 1897 and sought to recover the balance due to him under that decree by the sale of property *B*, which was the subject of the decree for redemption The opponent-defendant resisted the darkhast on the ground that the property was not attachable under section 99 of the Transfer of Property Act

The Subordinate Judge found that the opponent defendant's equity of redemption was attachable under section 99 of the Transfer of Property Act He, therefore, ordered execution to proceed

The opponent preferred an appeal, No 52 of 1909, to the District Judge, who, on the 25th November 1909, reversed the said order and dismissed the application for execution on the ground that *it was in contravention of section 99 of the Transfer* of Property Act which "provides that when a mortgagee attaches property mortgaged to him in execution of a decree *for the satisfaction of any claim* he shall not bring such property to sale

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BAI GANGA v. RAJARAM ATMARAM

otherwise than by instituting a suit under section 67 of the Act"

After the above order was passed the plaintiff applicant applied for its review and the District Judge reversed his order and directed that the property, against which execution was sought, be attached on the following grounds —

The application for attachment and sale was heard before the present Civil Procedure Code came into force but the order on it was passed after the Code became law Order XXXIV Rule 14, of the Code provides that when a mortgagee has obtained a decree for the payment of money in *satisfaction of a claim arising under the mortgage*, he shall not be entitled to bring the mortgaged property to sale otherwise by instituting a suit etc

The necessity for filing a suit is now confined to the cases in which a mortgagee seeks to bring mortgaged property to sale after obtaining a decree for payment of money in satisfaction of a claim arising from the mortgage under the Transfer of Property Act the mortgagee was obliged to sue, if he attached property mortgaged to him in satisfaction of any claim whether based on a mortgage or not.

The law to be applied is the law that was in force when the application for execution was presented (I L R 4 Bom 163) Section 99 of the Transfer of Property Act therefore is applicable and sale of the property is not permissible without a suit being brought This section does not, however, prohibit attachment of the property and it is contended for the applicant that the attachment on the property should have been allowed to remain undisturbed Section 99 of the Act contemplates attachment The decision of the High Court of Bombay (I L R 32 Bom 207) is in favour of the applicant's contention and the circumstances of the case are such that the property may be allowed to remain under attachment

Section 67 of the Transfer of Property Act is not in the applicant's way because a decree for redemption of the land which is the subject of these proceedings has been made I hold therefore that attachment of the property is valid but it cannot be sold in these proceedings

The opponent preferred a second appeal and the applicant filed cross objections

B F Dastur, for the appellant (defendant) —

The darkhast should have been dismissed as no order for sale could be made under section 99 of the Transfer of Property Act The application for execution did not contain a prayer for the attachment of the property The District Judge held that the

prayer for attachment could be implied as there was a prayer for sale We submit that the Court could not go beyond the terms of the application

G N Thakore, for the respondent (plaintiff) —

Though our application for execution did not contain a specific prayer for attachment, still as it was an application for the sale of the property the property could not be sold without attaching it The attachment was a step preliminary to the sale

Order XXXIV Rule 14 of the Code of 1908, applies to the present case and not section 99 of the Transfer of Property Act That section was repealed by the Code and it related to the manner of executing decrees by sale of mortgaged property It was entirely a rule of procedure Laws relating to procedure are always retrospective and apply to pending suits We are, therefore, entitled to have an order for sale of the attached property under Order XXXIV, Rule 14 of the Code

SCOTT, C J —In the year 1897 a decree was obtained upon a mortgage under which the mortgaged property was sold and the sale proceeds proved insufficient to satisfy the judgment-debt, the balance of Rs 581 remaining payable according to the terms of the decree by the mortgagors The mortgagee was also the holder of another mortgage executed by the same mortgagors upon other property One of the mortgagors after the decree had been passed died, and his mother who was the surviving mortgagor, instituted a redemption suit to redeem the other mortgage which had not been the subject of the decree and which for the sake of convenience we will speak of as the mortgage of property *B* She obtained a decree for redemption and an order for payment of the mortgage-debt by instalments, the mortgagee being entitled to a charge on the property *B* until his claim was satisfied

In August 1908 before twelve years had elapsed from the passing of the decree of 1897, the mortgagee applied for execution against property *B* in respect of the unpaid balance of Rs 581 payable under the decree

The execution was resisted and the application came on for argument before the Subordinate Judge on the 3rd February

1911

LAL GANGA
v
RAJARAM ATMARAM

1909 He held that an attachment was permissible even though section 99 of the Transfer of Property Act applied

From his decision there was an appeal to the District Judge, Mr Tyabji, who on the 25th November held that the application for execution was in contravention of the provisions of section 99 of the Transfer of Property Act, and accordingly the darkhast was dismissed Then in April 1910, for reasons which are not apparent to us, he revoked his decision given five months previously on a point of law and came to the conclusion that, although section 99 of the Transfer of Property Act still applied to the case notwithstanding the provisions of the Code of Civil Procedure, *Order XXXIV, Rule 14,* the attachment was nevertheless permissible He, therefore, reversed his decree dismissing the *darkhast* and directed the property against which execution was sought by the decree-holder to be attached

Both sides have appealed to this Court, the respondent by way of cross objection

The appellant says the learned Judge was wrong in permitting the attachment The respondent says that the learned Judge should have gone further and permitted a sale

We are of opinion that the Civil Procedure Code now in force in so far as it repealed section 99 of the Transfer of Property Act and substituted in its place Order XXXIV, Rule 14, merely effected a change of procedure in the manner in which mortgaged property has to be realized in execution of money decrees, and, therefore, *the statutory rule in force, for the purpose of the execution of the* unsatisfied portion of the decree of 1897, is the rule contained in Order XXXIV of the present Procedure Code For this reason we think that the respondent is entitled to an order on the darkhast that the property attached be sold, and we amend the decree of the District Judge by directing that the property be sold

The appellant must pay the costs throughout

Decree amended

G B R

CRIMINAL REVISION

Before Mr Justice Chandavarkar and Mr Justice Heaton

IN RE LAXMAN PANGU PANGARI * 1911 February 9

Criminal Procedure Code (Act V of 1898) section 520—Magistrate—Order as to disposal of property—On appeal to the Sessions Court the order left untouched—Application to the District Magistrate to revise the order—Jurisdiction—Notice to the other side—Practice

In trying a case of theft a Magistrate of the First Class convicted the accused and passed an order disposing of the property produced before him The Sessions Court on appeal confirmed the conviction, but left untouched the order as to the disposal of property An application was then made to the District Magistrate to revise the order and he varied it without issuing notice to the other side —

Held reversing the order that the terms of section 520 of the Criminal Procedure Code did not give any jurisdiction to the District Magistrate to interfere and that he could only interfere as a Court of Revision where there had been no appeal to the Sessions Court

Held also that the District Magistrate ought not to have disposed of the matter without giving notice to the other side

THIS was an application to revise an order passed by A F Maconochie, District Magistrate of Nasik, under section 520 of the Criminal Procedure Code, 1898

The order in question was passed under the following circumstances

One Laxmibai filed a complaint of theft against three persons, Magniram, Dinlal and Lalji, in the Court of the First Class Magistrate of Vinchur The theft was of some ornaments belonging to Laxmibai Lalji committed the theft and gave the ornaments to Magniram, who melted them and sold a portion of the ingot (about six tolas in weight) to a goldsmith Nagoo Nagoo mixed this gold with some gold of his own and made a *kala* (wristlet), which he sold to Laxman Rangu (the petitioner)

The Magistrate convicted and sentenced the accused As regards the property produced before him, he ordered that the *kada*

*Criminal Application for Revision No. 3?8 of 1910

1911

In re Laxman Rangu Rangari

should be restored to Laxman Rangu and the remaining ornaments to Laxmibai

The Sessions Judge of Nasik, on appeal, confirmed the conviction and sentence, and did not interfere with the order as to the disposal of property

The complainant next applied to the District Magistrate of Nasik, under sections 435 and 520 of the Criminal Procedure Code, to revise the order as to the disposal of property The District Magistrate, without issuing any notice to the other side, passed the following order "The *kada* should be broken up or melted and six tolas in weight of it given to the complainant Laxmibai"

The petitioner Laxman applied to the Sessions Judge at Nasik, but he rejected the application on the ground that as the District Magistrate as a Court of Revision was a Court of co ordinate jurisdiction with his Court, he had no jurisdiction to revise the order

The petitioner applied to the High Court under its criminal revisional jurisdiction

Nilkantha Atmaram for the applicant

R R Desai for the complainant

G S Rao, Government Pleader for the Crown

Chandavarkar, J —The District Magistrate had no jurisdiction to deal with this matter after there had been an appeal in the Sessions Court and after that Court had confirmed the conviction and sentence The terms of section 520 of the Criminal Procedure Code, 1898, do not give any jurisdiction to the District Magistrate under the circumstances of this case The Court of Revision such as that of the District Magistrate can only interfere where there was no appeal to the Sessions Court Here there was an appeal to the Sessions Court and the Sessions Court did exercise its jurisdiction And further even if the District Magistrate had jurisdiction, he ought not to have disposed of the matter without giving notice to the petitioner The District Magistrate was clearly wrong in upsetting the order of the trying Magistrate merely on the representation of the opponent Therefore, the rule must be made absolute

by setting aside the order of the District Magistrate and restoring that of the trying Magistrate

HEATON, J —I concur in the order proposed This is a case which, it seems to me, is governed by section 520 of the Code of Criminal Procedure That section to my mind is perfectly clear and its meaning is this that where the case is one in which an appeal lies, any party aggrieved by an order as to the disposal of the property must go to the Court of appeal Where the case is one where confirmation is required, he must go to the Court of confirmation, where it is neither the one nor the other, he may go to the Court of reference or revision Here the case is one in which an appeal lay, and therefore, it seems to me that the only Court which could deal with the order regarding the disposal of the property under section 520 is the Court of appeal, in this case the Court of Session Therefore the order made by District Magistrate was made without jurisdiction

Order set aside

R R

APPELLATE CIVIL

Before Mr Justice Chandavarkar and Mr Justice Heaton

THE COLLECTOR OF AHMEDABAD (ORIGINAL APPLICANT) APPELLANT *v* LAVJI MULJI (ORIGINAL OPPONENT) RESPONDENT *

1911 *February*

Civil Procedure Code (Act V of 1908) section 144—Decree—Interest, award of—Discretion of Court—Land Acquisition Act (I of 1894)—Court determining the amount of compensation—Payment of the amount to claimant—Subsequent reduction in amount on appeal—Interest over the excess—Inherent powers of the Court

A sum of money by way of compensation awarded under the Land Acquisition Act (I of 1894) and paid into Court was taken out by the claimant Subsequently on appeal, the High Court reduced the amount of compensation payable to him but made no order as to interest Government then applied to recover from the claimant interest over the excess drawn by the claimant from the Court

* First Appeal No 150 of 1910

1911

THE COLLECTOR OF AHMEDABAD v LAVJI MULJI

Held, that the interest claimed should be awarded inasmuch as the claimant had had the benefit of the money belonging to Government in excess of that to which the High Court held him to be entitled, and the benefit was represented not only by the excess wrongly taken by the claimant from the District Court but also the amount of interest which the exce s carried

Mookoond Lal Pal v *Mahomed Sami Meah*(1) and *Govind Vaman* v *Sakharam Ramchandra*( ), referred to

APPEAL from the decision of Dayaram Gidumal, District Judge of Ahmedabad, in Darkhast No 12 of 1910

Execution proceedings

In a proceeding under the Land Acquisition Act, 1894, the District Court awarded to the claimant Rs 1,650 4 0 as compensation for lands compulsorily acquired from him by Government The amount was deposited in Court on the 8th July 1908, and it was paid over to the claimant

Government appealed to the High Court against the award The High Court reduced the amount of compensation to Rs 1,112 3 9, it ordered each party to bear his own costs in appeal

On the 19th April 1910, Government applied to recover the amount paid to the claimant in excess and interest at six per cent on the excess amount from the 9th July 1908 to the 19th April 1910

The District Judge declined to award interest on the ground that the High Court had passed no order as to interest and it was the discretion of the Court to pass any orders as to interest

Government appealed to the High Court

G S Rao, Government Pleader, for the appellant referred to *Ram Coomar Coondoo* v *Chunder Canto Mookerjee*[3], *Rodger* v *The Comptoir D'Escompte de Paris*[4]

N K Mehta for the respondent —The lower Court had no power to entertain the *darkhast* for the execution of the award As soon as an award is made, the Court making it is *functus officio* see *Nilkanth* v *Collector of Thana*( ), and the only remedy

(1) (188_) 14 Cal 484 at p 49C (2) (1_78) 3 Bom 4 (3) (1876) L R 4 I A 23 at p 40 (4) (1871) L R 3 P C 465 (5) (1897) 22 Bom 802

to enforce it is by a separate suit see Article 17 of the Limitation Act (IX of 1908), and *Ibu Bakar v. Peary Mohan Mukerjee*[1]

On merits, Government are not entitled to any interest as they were not bound to deposit money if they wanted to appeal

CHANDAVARKAR, J —The question for determination in this case is whether interest ought to be allowed to Government on the moneys which, having been deposited by them in the District Court, were withdrawn by the claimant under the award in his favour made by that Court under the Land Acquisition Act but reversed in appeal by this High Court The learned District Judge has held that Government are not entitled to interest on the ground that the award of interest is in the discretion of the Court, and that, having regard to the decision of this Court which, in reversing the award of the District Court, directed each party in the acquisition proceedings to bear his own costs, it must be presumed that this Court did not intend the sum wrongly withdrawn by the claimant to carry interest with it Undoubtedly the award of interest is, generally speaking, a matter of the Court's discretion, except where by law it is made obligatory And the question is whether, in the circumstances of the present case, it is reasonable to award interest It is a rule of law that, where a party has wrongly taken from the Court moneys deposited in Court by his opponent, that Court has inherent power to enforce a refund of the amount with interest see *Mookoond Lal Pal v. Mahomed Sami Meah*[2] and *Govind Varian v. Sakharam Ramchandra*[3] In the present case the amount which was deposited with the Court by Government was taken away by the respondent, because that amount had been settled by that Court to be the amount of compensation to which the respondent was entitled under the Land Acquisition Act The High Court in appeal reduced the amount to which the respondent was entitled Under these circumstances the respondent must be held to have had the benefit of the money belonging to Government in excess of that to which the High Court held him entitled That benefit is represented not

(1) (1907) 34 Cal 451 (2) (1887) 14 Cal 484 at p. 486
(3) (187) 3 Bom 42

1911

THE COLLECTOR OF AHMEDABAD v JAVJI MULJI

only by the excess amount wrongly taken by the respondent from the District Court but also by the amount of interest which it carried with it

It was urged before us that this being the case of an award under the Land Acquisition Act and not a decree, the right of restitution claimed by Government cannot rest on the section of the Code of Civil Procedure which allows a refund of moneys received by a judgment creditor under a decree subsequently reversed or amended But assuming that the Code does not apply, the decisions above cited show that the right rests on the inherent power of the Court to enforce the refund

The order of the District Judge disallowing interest is set aside and Rs 57-5 4 is awarded to Government as interest on the amount of Rs 538 0 3

The respondent must pay the costs both of this appeal and of the *darkhast* in the Court below

Order set aside

R R

APPELLATE CIVIL

Before Sir Basil Scott Kt Chief Justice and Mr Justice Batchelor

1911 *February* 10

GURUNATH BALAJI MUTALIK DESHPANDE (ORIGINAL PLAINTIFF) APPELLANT v YAMANAVA KOM NALARAV DIVAN (ORIGINAL DEFENDANT), RESPONDENT *

Sale with an option of re purchase—Suit by vendor s grandson against the vendee's daughter in law—Covenant to re-purchase purely personal

A deed of sale with an option of re purchase contained the following clause — I have given the land into your possession , if perhaps at any time I require back the land I will pay you the aforesaid Rs 600 and any money you may have spent on bringing the land into good condition and purchase back the land.

In a suit brought 35 years after execution of the deed by the grandson of the vendor against the daughter in law of the vendee to exercise the option of re-purchase

* Second Appeal No. 677 of 1909

Held, that the covenant to re purchase was purely personal and the suit was not maintainable

SECOND appeal from the decision of T D Fry, District Judge of Dharwar, confirming the decree of G N Kelkar, First Class Subordinate Judge

The land in suit originally belonged to the plaintiff's grand father Krishnaji, who sold it to Sheshgir Rao Divan on the 11th March 1873 The sale deed provided as follows —

I have purchased this land at a Court sale for Rs 5 5 I have obtained the necessary sale-certificate For this (*as'as*) I have sold this land to you for Rs 600 received in cash I have no right to nor power, nor authority, nor ownership over (no right, title and interest *Hakka Satti Swamitwa*) this land I have given the land into your possession if perhaps (at any time--*Yekad vela*) I require back the land, I will pay to you the aforesaid Rs 600, and any money you may have spent on bringing the land into good condition and purchase back the land If I am so inclined to take back the land I will do so at the end of the year and not in middle of the year when you may have sown the land

In the year 1907 the plaintiff brought the present suit against the daughter in law of the vendee Sheshgir Rao to redeem and recover possession of the land alleging that the said transaction was mortgage but a sale-deed was taken from the vendor Krishnaji by fraud, misrepresentation and coercion, and against his will and consent, and that the stipulation to reconvey the land on payment of Rs 600 showed that the transaction was mortgage and not sale The plaint further alleged that the mortgage debt was fully satisfied and discharged out of the profits of the land

The defendant contended that the transaction was a sale and not a mortgage, that the covenant to re sell was only personal to the parties to the transaction and did not pass like other property to the heirs by inheritance and that there was no fraud, force, misrepresentation, coercion or absence of free consent in respect of the sale deed

The Subordinate Judge found that the transaction in suit was not a mortgage and that the sale deed was not taken from the vendor Krishnaji by fraud, force or misrepresentation or against his free will and consent He, therefore, dismissed the suit

1911

Lakshmi
v.
Tanoji.

The Subordinate Judge found that the plaintiff had made over the lands to the defendant on his having agreed to pay to the plaintiff Rs 50 annually for his maintenance, that the defendant had not broken his part of the agreement, therefore the plaintiff could not claim back the lands and that the plaintiff was entitled to maintenance only The suit was, therefore, dismissed

The plaintiff appealed to the District Court but before the appeal was admitted he applied for leave to withdraw the suit with liberty to bring a fresh suit, and the District Judge passed the following order —

Appeal dismissed with costs plaintiff (appellant) having been granted permission to withdraw from the suit with liberty to institute a fresh suit (see Exhibit 7 in appeal)

The defendant applied for the revision of the said order under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908), urging that the suit was allowed to be withdrawn on insufficient grounds, that the procedure followed was irregular, and that without notice to the defendant the suit should not have been allowed to be withdrawn with permission to bring a fresh suit A *rule nisi* was issued which called on the plaintiff to show cause why the order passed by the District Judge should not be set aside

K H Kelkar for the applicant (defendant) in support of the rule

N V Gokhale for the opponent (plaintiff) to show cause

Scott, C J —The plaintiff brought a suit against the defendant for possession of certain lands alleging that they belonged to him and had been handed over to the defendant on his undertaking to pay Rs 50, per annum to the plaintiff for maintenance and that the defendant had failed to do so

The defendant contended that the plaintiff had relinquished his rights in the lands in favour of the defendant Upon this defence the Subordinate Judge rejected the claim with costs

The plaintiff preferred an appeal to the District Court, but before the appeal was admitted he made an application under

Order XXIII for leave to withdraw the suit and bring a fresh suit This application was heard and granted by the District Judge without any notice to the defendant It is contended that the learned District Judge has acted with material irregularity in the exercise of his jurisdiction in two particulars In the first place, his duty upon the presentation of an appeal is laid down by Order XLI, Rule 11, from which it appears that he may dismiss the appeal without sending notice to the respondent or he may adjourn the hearing, and, if the appellant does not appear, he may dismiss the appeal But there is no provision allowing him to entertain an application the effect of which will be to get rid of the decree of the lower Court without any notice to the decree holder and without any hearing of the appeal It is also contended that the course taken by the learned District Judge is not sanctioned by the provisions of Order XXIII The Court is empowered to make an order permitting withdrawals from a suit or abandonment of part of a claim where it is satisfied that the suit must fail That implies that the suit has not yet been disposed of But in the present case the suit has been disposed of and the decree has been passed in favour of the defendant

1911

EKNATH v. LAXOJI

It is clearly, we think, beyond the power of the Court to allow a withdrawal from a suit with leave to file a fresh suit on the same cause of action after the defendant has obtained a decree in his favour

We, therefore set aside the order of the District Judge under Order XXIII and direct him to admit or reject the appeal under the provisions of Order XLI, Rule 11

Rule made absolute with costs

Rule made absolute

C B P

APPELLATE CIVIL

?

Before Mr Justice Chandavarkar and Mr Justice Heaton

1911
February 14

BAI MACHHBAI, WIDOW OF BAPURAJ LAKHABHAI AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS *v* BAI HIRBAI, WIDOW OF BAPURAJ LAKHABHAI (ORIGINAL PLAINTIFF) RESPONDENT *

Jurisdiction—Civil Court—Subordinate Judge of second class —Bombay Civil Courts Act (XIV of 1869), section 24—Suit for declaration—Declaration that an adoption was invalid—Claim valued for court fee purposes at Rs 130—Court Fees Act (VII of 1870) section 7, clause (IV) sub clauses (c) (d)—Property exceeding Rs 5,000 in value—Mahomedan Law—Converts from Hinduism—Custom of adoption—Burden of proof

A suit to obtain a declaration that an adoption was invalid was valued for court fee purposes at Rs 130 though the property affected by the adoption was more than Rs 5 000 in value It was brought in the Court of the Subordinate Judge of the second class whose jurisdiction extended only to suits involving claims valued under Rs 5 000 (Bombay Civil Courts Act 1869, section 24) It was objected that the Subordinate Judge had no jurisdiction to entertain the suit —

Held that the Subordinate Judge was competent to try the suit.

Sangappa v *Shivbasava*(1) and *Bai Reva* v *Keshavram Dularram*(2), followed

The Mahomedan Law does not recognise adoption Hence, where a Hindu is converted to Mahomedanism, the presumption is that as a necessary consequence of conversion the law of adoption recognised by Hindu Law has been abandoned by him. He who alleges that the usage and law in question had been retained must prove it

SECOND appeal from the decision of Dayaram Gidumal, District Judge of Ahmedabad, confirming the decree passed by N V Desai, Subordinate Judge of Dhandhuka

Suit for declaration

The plaintiff, a widow of one Bapuraj Lakhabhai, sued her co-widow (the defendant) for a declaration that the adoption of a son made by the latter be declared invalid The claim was valued for court fee purposes at Rs 130, though the property belonging to Bapuraj, which would be affected by the adoption exceeded Rs 5,000 in value

* Second Appeal No 607 of 1909

(1) (1889) P J p 98 (2) (189) P J p. 223

The parties to the suit were the Parmar Rajputs of Dhandhuka, who were converted to Mahomedanism nearly four hundred years ago They retained many Hindu customs of living and were governed in matters of succession and inheritance by Hindu Law

It was objected to the suit that as the property exceeded Rs 5,000 in value, the Second Class Subordinate Judge had no jurisdiction to hear the suit This objection was overruled by both the lower Courts They further placed the burden of proving that the custom of adoption prevailed among the caste to which the parties belonged on the defendant, and, as she failed to prove it, granted the declaration sought for by the plaintiff

The defendant appealed to the High Court

G K Parekh for the appellant

G S Rao for the respondent

CHANDAVARKAR, J —We agree with the District Judge in the view which he has taken both of the question of jurisdiction and of adoption The materials both in the Court of first instance and in the appeal Court are not such as to warrant our interference with the conclusion arrived at by the District Judge on the question of jurisdiction The case on that question resembles *Sangappa* v *Shivbasava*[1] and *Bai Rewa* v *Kesharram Dulavram*[2]

On the question of adoption the burden of proof lay in the first instance upon the appellant His case is that the Girasias, when they became Mahomedans, carried with them the law of inheritance and succession, and that, as part of that law, they also retained the Hindu law and custom of adoption But adoption is not necessarily inheritance or succession, although it leads to inheritance or succession The Mahomedan Law does not recognize adoption The presumption is that, as a necessary consequence of conversion to Mahomedanism, the law of adoption recognized by Hindu law and usage had been abandoned by the Girasias Therefore those who allege that the usage and law in question had been retained must prove it The decree must be confirmed with costs

Decree confirmed

R R

(1) (1889) P J p 98 (2) (1895) P J p 228.

APPELLATE CIVIL

Before Sir Basil Scott, Kt, Chief Justice and Mr Justice Batchelor

1911 February 17

KASHINATH RAMCHANDRA POTNIS (ORIGINAL DEFENDANT APPLICANT) APPELLANT *v* VINAYAK GANGADHAR BHAT AND OTHERS (ORIGINAL PLAINTIFFS OPPONENTS), RESPONDENTS *

Dekkhan Agriculturists Relief Act (XVII of 1879), section 2 explanation (b)(1)*—Agriculturist, definition—Assignee of Government revenue, not an agriculturist*

The income derived from tenants by an Inamdar which is to a certain extent attributable to the fact that he is the assignee of Government revenue and therefore does not have to pay over a portion of that income to Government but may keep it for himself cannot be taken into consideration in estimating whether or not he earns his livelihood wholly or principally by agriculture, and therefore is not an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act (XVII of 1879)

FIRST appeal against an order passed by Ruttanji Mancherji, First Class Subordinate Judge of Poona, in the matter of an application for a declaration of status as an agriculturist

One Gangadhar Keshav Bhat, the predecessor in interest of the present plaintiffs, obtained a decree, No 60 of 1893, against the defendant in the Court of the First Class Subordinate Judge of Poona The decree was passed in the terms of an award and was dated the 18th February 1893 It directed that the defendant should pay to the plaintiff Rs 9,125 within five years and on his default the plaintiff should recover the amount by the sale

* First Appeal No 70 of 1910

(1) Dekkhan Agriculturists Relief Act section 2, explanation (b) —

2 In construing this Act unless there is something repugnant in the subject or context the following rules shall be observed namely :—

Agriculturist shall be taken to mean a person who by himself or by his servants or by his tenants earns his livelihood wholly or principally by agriculture carried on within the limits of a district or part of a district to which this Act may for the time being extend or who ordinarily engages personally in agricultural labour within those limits

Explanation (a) :— * * * * * *

Explanation (b) :—An assignee of Government assessment or a mortgagee is not as such an agriculturist within this definition

of the mortgaged properties An order for sale absolute of the mortgaged properties was passed on the 25th March 1907 Subsequently the plaintiffs having applied for the execution of the decree by Darkhast, No 441 of 1909 the defendant presented an application, dated the 4th January 1910, stating that he was an agriculturist and as such was entitled to the benefit of the Dekkhan Agriculturists' Relief Act The Subordinate Judge found on the evidence that the defendant was not an agriculturist as defined by the Dekkhan Agriculturists Relief Act and rejected the application His reasons were as follows —

To sum up his agricultural income is Rs 264 8 0 in the Colaba District plus Rs 443 in the Satara District, plus Rs 10 ryotwari lands in the Satara District total Rs 716

While his non agricultural income is Rs 304 15 4 Saranjam allowance plus Rs 428 7 0 Satara Inam plus Rs 280 Colaba Inam plus Rs 11 Deshpande allowance—total Rs 1,114 6 4 which greatly preponderates over his agricultural income

Defendant appealed

K N Koyaji for the appellant (defendant) —The defendant being Inamdar of both the revenue and soil, the revenue that he appropriates to himself without giving it over to Government is as much part of his agricultural earning as the rest of the produce of the soil In the case of an Inamdar of revenue only, he gets a share of the produce of the land cultivated by some one else He is, therefore, not an agriculturist within the meaning of section 2 of the Dekkhan Agriculturists' Relief Act But the income which a cultivator himself retains is his earning derived by agriculture

P P Khare for respondents 1, 8 and 9 (plaintiffs 1, 8 and 9) —The share of the produce paid as revenue and retained as Inam is not agricultural income It is an assignment of revenue only The ruling in *Purshotam v Sitaram*[1] shows that the Inam of revenue is distinct from Inam of soil Explanation (*b*) to section 2 of the Dekkhan Agriculturists Relief Act lays down that an assignee of Government revenue is not an agriculturist

P D Bhide for respondents 1—6 and 9 (plaintiffs 1—6 and 9)

[1] (1906) 8 Bom L R 606.

1911

KASHINATH RAMCHANDRA v. VINAYAK GANGADHAR.

Koyaji in reply —The ruling in *Purshotam* v *Sitaram*[1] does not touch the present point Explanation (*b*) to section 2 of the Dekkhan Agriculturists Relief Act is not an exception to the definition but only an explanation

SCOTT, C J —The question that we have to decide in this case is whether the income derived from tenants by an Inamdar which is to a certain extent attributable to the fact that he is the assignee of Government revenue and therefore does not have to pay over a portion of that income to Government but may keep it for himself, can be taken into consideration in estimating whether or not he earns his livelihood wholly or principally by agriculture and therefore is an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act

The answer to the question depends upon what force is to be attributed to explanation (*b*) of the definition in section 2 That explanation says "An assignee of Government assessment or a mortgagee is not as such an agriculturist within this definition

Now, we think, it is clear that if the object of that explanation was to exclude the consideration of the income of a mortgagee as such it must also have been the intention to exclude the consideration of the income of an assignee of Government as such We have no difficulty in arriving at the conclusion that the object of the legislature was to exclude mortgagees, to the extent to which their income is derived from their rights as mortgagees, from claiming the special benefit of the Act, and, therefore, we are forced to the conclusion that the legislature also intended to exclude assignees of Government assessment in that capacity from claiming the benefit of the Act

In the case before us, therefore, the receipts of agricultural income attributable to the position of the applicant as Inamdar must be excluded from consideration, and in this view the conclusion arrived at by the Subordinate Judge that the applicant is not an agriculturist is correct

We dismiss the appeal with costs

Appeal dismissed

G B R

(1) (1906) 8 Bom L R 606.

APPELLATE CIVIL

Before Mr Justice Chandavarkar and Mr Justice Heaton

VYANKAPACHARYA BIN SHRINIVASACHARYA (ORIGINAL PLAINTIFF), APPELLANT *v* YAMANASAMI, DAUGHTER OF RADHASAMI (ORIGINAL DEFENDANT) RESPONDENT * 1911 February 20

Vendor and purchaser—Sale of property in possession of a third person—Person in possession claiming to be owner—The vendor a benamidar—Negligence

The plaintiff purchased a house from a person who had the title deeds of the house made out in his name The house was in the defendant s possession who claimed to be its owner and it appeared that the plaintiff's vendor was only a *benamidar* for the defendant The plaintiff sued to recover possession of the house from the defendant —

Held that the plaintiff could not succeed because he omitted to make the inquiries which he was bound to make to perfect his own title and by his own negligence exposed himself to the risk of purchasing property which in reality belonged not to his vendor but to the defendant

SECOND appeal from the decision of F X DeSouza, District Judge of Bijapur confirming the decree passed by H V Kane, Subordinate Judge of Bagalkot

Suit to recover possession of a house

The house in question was sold by its owner Solbanna to one Guracharya on the 4th July 1903 Guracharya died in 1905 and on the 2nd October 1907 his widow Laxmibai sold it to the plaintiff

The house was in the possession of Yamanasami (the defendant), a concubine of Guracharya She claimed to be its owner saying that the house was purchased for her with her own money by Guracharya who was a *benamidar* for her The plaintiff sued to recover possession of the house from the defendant The defendant in reply set up her ownership to the house The Subordinate Judge found it proved that the defendant had purchased the house in suit from Solbanna with her own money and got from him the sale deed in Guracharya's name *benami* for her, that the plaintiff had no notice of it, and that the

* Second Appeal No 130 of 1910

1911

EMPEROR
v
AMIR BALA

of three years and referred the case to the Sessions Judge under clause (3) of section 123 of the Code The latter confirmed the order without going into the merits of the case

Held, that the words of clause (3) of section 123 of the Criminal Procedure *Code 1898 were wide enough to give discretionary* power to the Sessions Judge to deal with the case on the merits and pass such orders as the circumstances of the case might require

THIS was an application to revise the order passed by F J Varley, Sessions Judge of Khandesh

Proceedings under sections 110 and 118 of the Criminal Procedure Code, 1898, were instituted against the accused before J P Brander, First Class Magistrate of East Khandesh The Magistrate held the inquiry and found that the acts of the accused fell within clauses (*a*), (*c*), (*d*) and (*f*) of section 110 of the Criminal Procedure Code, 1898 He therefore, ordered them under section 118 of the Code to be bound over for a period of three years, and directed each one of them to execute a personal bond for Rs 5,000 and to furnish two respectable sureties for the same amount He then referred the case to the Sessions Judge of Khandesh under section 123 of the Criminal Procedure Code, 1898

The Sessions Judge heard the accused's Counsel, and confirmed the order without allowing him to go into the merits of the case, on the following grounds —

It is not disputed that there is abundant information and evidence upon the record which would if believed, justify the Magistrate's order, the novel contention put forward so far as this Court is aware for the first time is that the Sessions Court should in the course of these proceedings exercise its judicial functions in the direction of entering fully into the merits of the case reappreciating the evidence, and setting the order of the Magistrate aside as based on false information and worthless evidence

Now in the first place, there is no provision in the Code for the party or his pleader being heard at all in proceedings submitted under this section but on general principles it may be conceded that a party to whose prejudice an order may be passed may have a hearing (I L R 23 Calcutta page 493 and I L R 27 Calcutta, page 656) but the scope of this hearing must be rigidly limited by section 123 (3) Criminal Procedure Code he may urge that the information or evidence require to be supplemented or that the order may be modified in one direction or another, or even, if it were based patently on no evidence or

information (and this defect could not be remedied by the Magistrate) in the last resort set aside but from the proposition that the party or his pleader can ask the Sessions Court whether as a Court of first instance or appeal to enter into the merits of the case, or reappreciate the evidence this Court must emphatically dissent there is of course, no authority if it needed to be enforced, for the principle that the order passed by the Sessions Court is its own order and no mere adoption of the provisional order of the Magistrate and the Court will exercise its own discretion in passing such an order within the limits assigned to it by section 123 (3)

That the Court is not exercising its ordinary criminal jurisdiction and that the jurisdiction conferred by section 123, Criminal Procedure Code upon a Sessions Court is concerned rather with the exercise of a power *for the prevention of an offence* is emphasised by a Full Bench Criminal Ruling of the Bombay High Court No 73 of December 1895

Section 406 Criminal Procedure Code makes all orders from Magistrates in the District appealable to the District Magistrate and the Sessions Court has really no concern with the merits of orders passed by Magistrates that this is the intention of the Legislature is clear from the amendment of section 123 (3), Criminal Procedure Code when the Calcutta High Court (I L R 24 Cal. 165) laid down that the information and evidence which was defective must be supplied by the Sessions Court itself the delegation of this duty to the Magistrate who held the inquiry under section 118 Criminal Procedure Code clearly shows that there never was any intention that the Sessions Court should enter into the merits of the making of these orders under Chapter VIII As the contention if allowed would add enormously to the work of the Sessions Court, its decision is one of great importance Mr Kazi Kabirudin having announced his intention of not resting content with the Ruling of this Court, proceedings are suspended, and this Court rules that there is no authority for Mr Kazi Kabirudin's contention and must decline to hear him on the merits

The accused applied to the High Court under its criminal revisional jurisdiction

P B Shingne, for the accused —The language of section 123 of the Criminal Procedure Code, 1898, is wide enough to warrant the Sessions Judge to go into the merits of the case If the order were to be for a security for one year, the accused could have appealed under section 406 of the Code The learned Judge should therefore have gone into the merits of the case

G S Rao, Government Pleader, for the Crown —The accused, if aggrieved, have the recourse to appeal or apply in revision It will be sufficient for purposes of justice The language of

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section 123 does not warrant the conclusion for which the accused are moving this Court

CHANDAVARKAR, J —Clause 3 of section 123 of the Criminal Procedure Code provides —

"Such Court after examining such proceedings and requiring from the Magistrate any further information or evidence which it thinks necessary, may pass such order on the case as it thinks fit'

The words are wide enough to give discretionary power to the Sessions Judge or the High Court, as the case may be, to deal with the case on the merits and pass such order as the circumstances of the case, in his opinion, may require

We must, therefore, make the rule absolute and ask the Sessions Judge to deal with the matter, having regard to this order

HEATON, J —I agree to the proposed order Unless the words used in section 123 of the Criminal Procedure Code are intended to confer on the Court of Session power to go into the merits in a case of this kind, and, indeed, unless they require it to go into the merits, if any point is raised which involves the merits, I am unable to understand what these words mean It is true that section 106 provides that an appeal lies to the District Magistrate But I think that the Sessions Judge is wrong in arguing that although he himself might make an order under section 123 the order requiring security would still be the order of the Magistrate and would still be open to appeal to the District Magistrate under section 406 It seems to me that when the Sessions Judge has dealt with a case under the provisions of section 123, the order passed by him, whatever it may be, becomes the order in the case, and there is no longer an order by a Magistrate made under section 118, which can be the subject of an appeal to the District Magistrate

Therefore, the Sessions Court is the only Court which has the power to deal with these cases, and being that only Court it must go into the merits if required, and if the Judge is to go into the merits, he is bound, according to the general principles

of justice, which are applicable in British India, to give the person affected by the order an opportunity of being heard

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Therefore, I consider that the rule must be made absolute

Rule made absolute

R R

APPELLATE CIVIL

Before Mr Justice Chandavarkar and Mr Justice Heaton

NARAYAN SADOBA HALWAI (ORIGINAL DEFENDANT) APPELLANT, v UMBAP ADAM MEMON (ORIGINAL PLAINTIFF) RESPONDENT *

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March 31

Civil Procedure Code (Act XIV of 1882) sections 282 287—Decree—Execution—Attachment—Application to raise attachment by a third person—Court declaring lien in his favour—Property sold subject to lien—Third party suing the auction purchaser for amount of lien—Auction purchaser can question the existence of lien

In execution of a money decree obtained by G against H certain property belonging to the latter was attached U intervened in those proceedings and asked to raise the attachment on the ground that the property was his. The Court investigated the claim under sections 280 and 281 of the Civil Procedure Code of 1882 and held that the property belonged to H and that U was entitled to a lien on the property for Rs 687 11 3 The property was then sold at a Court sale subject to the lien and purchased by N U sued N to recover the amount of his lien N contended that the order passed in the miscellaneous proceedings did not bind him and that he was entitled to question the existence of the lien —

Held that N was not bound by the order passed in the miscellaneous proceedings for he could not be regarded as a party to it being not a representative either of the judgment debtor or of the judgment-creditor

Vasanji Haribhai v *Lallu Akhu*(1) *Vishvanath Chandu Naik* v *Subraya Shivapa Shetti*(2) followed

Held further, that N was entitled to question the existence of the lien inasmuch as the order passed by the Court as to the lien could not be regarded as one passed under section 282 but as one passed under section 287 of the Civil Procedure Code of 1882

Second Appeal No. 958 of 1909

(1) (1885) 9 Bom. 285 (2) (1890) 15 Bom 290.

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NARAYAN SADOBA HALWAI v UMBAR ADAM MEMON

SECOND appeal from the decision of P J Taljarkhan, District Judge of Thana, reversing the decree passed by D D Cooper, Subordinate Judge of Bassein

One Govind Sadoba Halwai obtained a money decree against one Haroo Hassan Memon in 1903 In execution of the decree Govind attached some property as belonging to his judgment debtor Haroo Hassan Memon In those proceedings, one Umbar Adam Memon intervened and applied to raise the attachment on the ground that the property belonged to him The Court investigated the claim under sections 280 and 281 of the Civil Procedure Code of 1882 and found that the property belonged to Haroo Hassan, the judgment debtor, but declared Umbar Adam entitled to the lien on the property for Rs 687 11 3 The Court, on the 20th December 1905 ordered the property to be sold subject to Umbar Adam's lien The property was sold subject to the lien at a Court sale on the 16th March 1906 and purchased by Narayan Sadoba Halwai (the defendant)

In 1908, Umbar Adam brought the present suit to recover the amount of his lien from Narayan Sadoba (the defendant)

The defendant in his written statement contended *inter alia* that he had no knowledge of plaintiff's encumbrance and that he was not liable for the claim

The Subordinate Judge held that the defendant was not bound by what took place in the miscellaneous proceedings to which he was not a party, but as the plaintiff adduced no evidence to prove his claim he dismissed the suit

This decree was, on appeal, reversed by the District Judge, who held that the defendant was precluded from disputing the lien The plaintiff's claim was decreed

The defendant appealed to the High Court

D A Khare and *B V Desai* for the appellant

G S Rao for the respondent

CHANDAVARKAR, J —The facts which arise in this second appeal for the determination of the question of limitation argued before us are shortly these One Govind Sadoba obtained a money decree against one Haroo Hassan In execution of

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NARAYAN SADOBA HALWAI v. UMDAR ADAM MEMON

t money decree the property in dispute was attached by the gment-creditor The present respondent plaintiff intervened applied to have the attachment raised on the ground that was owner of the property

pon investigation of the claim under sections 280 and 281 he Civil Procedure Code the Court held that the property nged to the judgment debtor, not to the present plaintiff it also held that the intervenor was entitled to a lien on the erty Accordingly the Court passed an order that the pro y should be attached and sold, subject to the lien of the rvenor The property was sold subject to the present plaint- lien, namely, Rs 687-11 3, and the defendant purchased it he Court sale

he plaintiff has now brought the suit to recover the amount he lien which, he contends, has been established conclusively the order passed in the miscellaneous proceeding The lower rt has allowed the claim But it is contended before us by endant, the auction purchaser, that he is entitled to question existence of the lien, that the miscellaneous order does not l him, and that he was not bound to bring a suit to set e that order after the sale within a year from its date It been held by this Court, in a series of cases, that under the umstances mentioned above, the auction purchaser cannot regarded as a party to the miscellaneous order, being not epresentative either of the judgment debtor or of the judg t creditor see *Vasanji Haribhai* v *Lallu Akhu*[1] and *hanath Chandu Naik* v *Subraya Shivapa Shetti*[2] Unless, refore, the plaintiff brings this case within the principle of decisions in *Yashvant Shenvi* v *Vithoba Sheti*[3] and *nagauda* v *Paresha*[4], his suit must fail But these two isions cannot apply here, because there the auction purchaser also the attaching creditor, and therefore, the order was which bound the parties to it and the suit was brought the party who was unsuccessful in the miscellaneous pro- ding

(1) (188.) 9 Bom 235
(2) (1890) 15 Bom 290
(3) (1887) 12 Bom 231
(4) (1897) 22 Bom. 640

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The second ground is that in the miscellaneous proceeding the plaintiff came in and sought to raise the attachment upon the ground that the property belonged to him There was no question directly raised by him that he was entitled to a lien The question of lien came in only incidentally, and therefore, the order passed by the Subordinate Judge, that the property should be sold subject to the plaintiff's lien, cannot be treated as an order under section 282 It must under the circumstances be regarded as one made under section 287

The lower appellate Court having erroneously disposed of the preliminary point arising in this case, we must reverse the decree and remand the appeal to that Court for a hearing on the merits

Costs to be costs in the appeal

HEATON, J —I agree to this order I notice that the District Judge has distinguished clearly between two different aspects of the case The first was the question whether the auction purchaser is bound by the order in the miscellaneous proceeding, and he held, I think quite rightly that the auction purchaser was not bound, the second aspect of the case was whether the property sold was the equity of redemption and nothing else The Judge held, in my opinion, wrongly that what was sold was the equity of redemption only

Now, if this were a finding of fact, we should be bound by it, but to my mind it is not a finding of fact It is merely a determination of the legal effect of certain documents There is no dispute as to the meaning of the words in the documents They are the proclamation of sale and the certificate of sale, and they are undoubtedly to the effect that what is sold is the property, i e, landed property, subject to a certain charge the nature and amount of which are mentioned It is not in terms a sale of the equity of redemption Therefore, it seems to me, that the District Judge was wrong in deciding the case on the ground that the purchaser had bought nothing but the equity of redemption

As to the first aspect of the case I will say a few words The dispute arose between the decree holder and a third person

who objected to the sale of certain properties alleged to belong to the judgment debtor To that dispute the judgment debtor himself was not made a party, in any sense of the word whatever He had no notice of this dispute and he never intervened in it The dispute was heard, in that summary manner, which is adopted in such proceedings It was not tried with the thoroughness and with that care to secure that all persons interested are parties with which such a suit, for instance as a mortgage suit, is tried, the decision arrived at by the Court is a decision which not only binds the parties to the dispute, but, unless a suit to set it aside is brought within one year, it is final But it seems to me that it would be wrong on principle to hold that the decision arrived at binds anyone whatever who is not a party to the dispute or one who derives interest from a party Now the judgment-debtor was not a party to that dispute and he is not a person who has derived interest from either of the parties It seems to me therefore to be contrary to first principles to say that the decision arrived at in that dispute has any legal effect whatever as regards the judgment debtor, in the nature of *res judicata* or for the purpose of preventing him or the auction purchaser, if indeed the auction-purchaser can be supposed to be his representative, from re opening that matter which was decided

Decree reversed

R P

ORIGINAL CIVIL

Before Mr Justice Robertson

MOTILAL MILHAILAL AND ANOTHER PLAINTIFF v THE ADVOCATE GENERAL OF BOMBAY AND OTHERS, DEFENDANTS * 1910 *August* ..

Hindu Law—Will—Use of expression ' malik —Widow's estate—Construction

A Hindu died leaving a Will by which (*inter alia*) he appointed his wife as residuary legatee in the following words — As regards whatever may

* Suit No 2 G of 1910 Originating Summons

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remain over I appoint my wife Dhancore as the owner (*malik*) of the whole thereof The management of the property comprising the said residue was provided for by the appointment of two persons named in the Will and certain other restrictions were placed on the management of the property by the wife *Finally provision was made for the further distribution of the* property after the wife's death

Held that the widow took a widow s estate and not an absolute estate

The use of the expression *malik* by itself would be sufficient to give the widow an absolute estate but the knowledge of the testator as to the incidents of a widow s estate and the ordinary notions or customs of Hindus is to be considered in construing a Will

THIS matter came before the Court on an originating summons taken out by the executors under the Will of one Jethalal Nathalal who died on 9th October 1907 leaving him surviving his widow Dhancore (second defendant) and three daughters by a pre-deceased wife (the third, fourth and fifth defendants) The sixth defendant was first cousin to the deceased and the Advocate General was made a party as representing certain charities

The clauses of the Will and the questions in dispute are sufficiently set out in the judgment of the learned Judge

Nadkarni for the plaintiffs

Jardine, Acting Advocate General, for the first defendant

Jinnah for the second defendant

Kanga for the third defendant

Dastur for the fourth, fifth and sixth defendants

ROBERTSON, J —This is an originating summons taken out for the purpose of obtaining the Court's opinion upon the construction of the Will of one Jethalal Nathalal, who died on the 9th October 1907 leaving a Will dated the 15th of July 1907 The summons is taken out by the executors according to the tenor of the Will, and the principal point that arises is the determination of the question What, if any, interest is taken by the second defendant Bai Dhancore under the Will of the testator? Bai Dhancore is the widow of the testator

The Will, which is in Gujrati sets out that the testator had certain properties which he desired to dispose of and he commences his Will by saying

'I in full consciousness make this my Will agreeably to what is written below The particulars thereof are as follows —

'1 There are my three daughters by name Mani and Kasi and Somi born of the womb of my first married wife Jadav and no son whatever is alive My said wife Jadav is dead

'2 I have got my eldest daughter Mani married to Shah Hargovandas Vachhraj in Bombay and my two other daughters Kasi and Somi have remained to be betrothed and married

'3 After the decease of my wife Jadav I have married again with Dhancore the daughter of Shah Chunilal Jethalal in the city of Broach No child whatever has yet been born of her womb'

He then recites that he had a piece-goods business carried on in two shops, and proceeds 'An agreement has been made with them (my partners) on stamped paper of the value of Rs 10 (namely) ten And both of these partners have not got any capital whatever credited in their names in the two shops carried on in my name We three partners have equal shares" Then he proceeds 'And the whole capital in the shops belongs to me personally The same amounts to about Rs 15 000 namely Rupees fifteen thousand All those moneys belong to me personally Therefore Shah Bhogilal Jugaldas of Cambay, who is my maternal uncle in-law, and Shah Motilal Mithalal together shall on my behalf after my life time (decease) deal with these moneys after my life-time (decease) agreeably to what is written below, because my wife has not as yet attained her full age In like manner my daughters are young Therefore they shall deal with (or dispose of the said moneys) agreeably to (what is written) below —The particulars thereof are (as follows)' Thereafter he makes certain provisions with regard to his daughters setting aside the sum of Rs 3,000 for the benefit of the daughters, and finally he directs "My daughters shall not sell the same That refers to the Rs 3,000 to be invested in Government Promissory Notes After reciting the existence of his charity account in his piece goods shops and giving certain legacies, he says "An arrangement

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agreeably to the above particulars shall be made out of the moneys appertaining to my capital in my above shops On the above moneys being deducted, as regards whatever may remain over, I appoint my wife Dhancore as the owner of the whole thereof' I understand that the word used for owner is "*malik*" He then enumerates his immoveable property and other properties such as goods and chattels, vessels and utensils, clothes and wearing apparel, etc, and all claims and outstandings appertaining to his piece goods shops, and finally to all these he says "I appoint my wife Dhancore as the owner of the whole of the said property' Here, again, I understand the expression used is "*malik*" He then proceeds "She shall with the advice of the above written two persons carry on the '*vahivat*' (management) thereof And for doing that business a good (competent) Mehta or man should be employed Such person as these two persons (that refers to the two persons Bhogilal and Motilal) may desire to keep shall be employed and (the said management) shall be carried on And on the death or decease of any of these two (persons) another good (and) proper person shall again be admitted who shall live (act) consistently with his respectability and reputation And as regards the memorandum of ornaments (and) jewellery which I have made (written out) in my handwriting and kept in my box when the above written two persons may desire to see the same, the same shall be shown to them' It is a little difficult to understand exactly what the testator meant by this provision but I have very little doubt that when he says that the list of the jewellery is in his box and that the list is to be shown whenever they wish it to the persons whom he practically appoints executors, he means it to be shown for the purpose of comparing the list with the ornaments to see that they are all there Then the Will proceeds "After my life-time (decease) a '*lahanu*' (distribution) of vessels shall after me be made within (my) '*varsi*' (first anniversary) amongst the (members of my) caste in Surat My wife shall act according to the wishes of the two persons written above Should she however act contrary to what they may say, (these) two persons shall make such arrangement as they may think proper And on my wife's

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decease the Caste "*Mahalam*" outlays having been made in a good manner, as regards what may remain over, moneys shall be given out of the same into the "*Nirashrit*" fund and to my three daughters and to my maternal uncle's son Lalbhaidas Kanji on such arrangement having been made as the above written two persons may deem proper According to the above particulars (my property) shall after me be administered "

It is argued on the one hand that Bai Dhancore under these provisions merely took the income during her life On the other, it was argued that she took either an absolute estate or at the very least a widow's estate

If I was at liberty to speculate as to what the testator meant, I should have very little hesitation in coming to the conclusion that his intention was that his wife should have the full benefit of the estate during her life but that he intended that she should be guided throughout by the advice of his executors and that he intended to make a gift over after her death to his three daughters and his maternal uncle's son But the authorities are perfectly clear that what the Court has to do is not to speculate upon what the testator intended to say but has to construe the intention as it is actually expressed in the Will It is, therefore, necessary to consider what the authorities say in regard to Wills of this character made by Hindus It is not necessary to refer to more than a few of the cases that have been cited before me, and I think it best to base my decision upon the authorities which are reported in the Bombay Law Reports and on the Privy Council cases to which I will refer In *Harilal v Bai Rewa*[1] a somewhat similar point came before Chief Justice Farran and Mr Justice Strachey The headnote says "A Hindu by his Will directed that after his death his wife was to take possession of and enjoy his property, and in another passage declared that 'just as he was the owner so she was to be the owner', but there were no words of inheritance used, nor did he directly give his wife any power of disposition over the property *Held*, that she took only a life interest in the property " And at page 380 Sir Charles Farran says "The Courts have

(1) (1896) 21 Bom 376

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always leaned against such a construction of the Will of a Hindu testator as would give to his widow unqualified control over his property By the use of such expression as 'my wife is the owner after me' or 'my wife is the heir' it is usually understood that the testator is providing for the succession during the life-time of the widow and not altering the line of inheritance after her death "

In *Chunilal* v *Bai Muli*[1] very much the same point came before a Court composed of Messrs Justices Parsons and Ranade There the words of the Will were "After my death, my wife, if she be alive is the rightful heir, and if she be not alive, and after the death of my wife, my daughter Bai Nathi is my rightful heir (*haldar waras*)" ' As to my daughter Nathi, whom I have, after the life-time of myself and of my wife, appointed heir to my property, and as to the surplus the heir to the same is my daughter Nathi" The testator died in 1894, Nathi in 1895, and the wife in 1897 Thereupon the testator's step mother claimed the property as his reversionary heir *Held*, that under the Will Nathi took an estate vested in interest from the testator's death, which would pass to *her* heirs on her death, and the step mother would have no title And in the judgment Mr Justice Parsons says at page 423 "The facts, therefore, are almost exactly the same as those in the case of *Lallu* v *Jagmohan*[2], and, if that ruling is followed, the result would be that Nathi would take an estate vested in interest from the testator's death which would pass to her heirs on her death, and the plaintiff would have no title" He then says "There is no real difference in the meaning of the words *malik* (assuming that that was the vernacular word translated owner) and *waras* when they are used in the Wills The intention of the testator in each case to give his whole property to his wife for life and on her death to his daughter absolutely is clear'

I consider that those two cases show that so far as the Bombay decisions are concerned, there would be no doubt that on the true construction of this Will the widow did not take an absolute estate But there are two Privy Council decisions

(1) (1899) 24 Bom 420 (2) (1896) 22 Bom. 409.

upon the point to which it is important to refer The first is that of *Moulvie Mahomed Shumsool Hooda* v *Shewukram*[1] There, a Hindu inhabitant of Behar, by a document of testamentary character after reciting that the property of which he was about to dispose was ancestral property, and reciting the deaths of his only son, of his brother without leaving issue, his brother's wife and his own wife, declared "only D K, widow of my son, who too excepting her two daughters, born of her womb, S and D, has no other heirs, is my heir Except D K, none other is, nor shall be my heir and *malik*" At page 14 of the judgment which was delivered by Sir Robert P Collier it is said "He (that is the testator) then uses expressions which, if they stood alone, would, in their Lordships' opinion, shew that he intended to make an absolute gift to Ranee Dhun Kowur The expressions are these" (I have just read them) "It has been contended that these latter expressions qualify the generality of the former expressions, and that the Will, taken as a whole, must be construed as intimating the intention of the testator that Mussumat Ranee Dhun Kowur should not take an absolute estate, but that she should be succeeded in her estate by her two daughters In other words, that she should take an estate very much like the ordinary estate of a Hindu widow In construing the Will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family, and it may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate Having reference to these considerations, together with the whole of the Will, all the expressions of which must be taken together without any one being insisted upon to the exclusion of others, their Lordships are of opinion that the two Courts in India, who both substantially agree upon this point, are right in construing the intention of the testator to have been that the widow of his son should

[1] (1874) L R 2 I A 7

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not take an absolute estate which she should have power to dispose of absolutely, but that she took an estate subject to her daughters succeeding her in that estate, whether succeeding her as heirs of herself or succeeding her as heirs of the original testator is immaterial "

But it remains to be considered whether the case of *Musammat Surajmani* v *Rabi Na'h Ojah*[1] has so modified the force and effect to be given to the decisions I have just cited as to affect my judgment in this case The headnote in that case says "Where a Hindu husband gave certain property by deed of gift or testamentary instrument to his first and second wives and daughter in law respectively, reserving to himself a life interest, but directing that after his death they shall be '*malik wa khud ikhtiyar, i e*, owners with proprietary powers' *Held*, in a suit by the husband's reversionary heirs for a declaration after the death of the said second wife that she was incompetent to alienate the property so given, that she took an absolute estate The word '*malik*' imports full proprietary rights, unless there is something in the context to qualify it The fact that the donee is a Hindu widow is not sufficient for that purpose " And at page 19 their Lordships say The words translated, as owners with proprietary powers are in the original (I read them) The appellants contend that these words are amply sufficient to confer an alienable estate The respondents on the other hand contended, and Courts below have held, that under these words the lady took no more than the ordinary estate of a Hindu widow which is inalienable except in special conditions which are not alleged to exist in this case Then they proceed to set out the facts and to deal with various previous decisions, and they say at page 21 "This case seems to adopt and apply the same view of the word '*malik*' as was taken in the Calcutta case in 24 W R above cited, with the result that in order to cut down the full proprietary rights that the word imports something must be found in the context to qualify it Nothing has been found in the context here or the surrounding circumstances, or is relied upon by the respondents, but the fact that the donee is a woman and a widow, which

(1) (1907) L R 35 I A 17

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As to the fourth question "Whether the gift over in the sa Will contained on the death of the second defendant is valid invalid, and if valid, who are the persons entitled to the sa residue on her death and in what proportions, and for wh interests," in my opinion the time has not arrived for answeri that question

The plaintiff's and the Advocate General's costs to be paid o of the estate as between attorney and client The seco defendant to have her costs out of the estate Defendan 4 and 5 to have their costs out of the estate as between par and party Defendants 3 and 6 to have one set of costs betwe them as between party and party

Attorneys for plaintiff —Messrs *C P D Cunha & Co*

Attorneys for defendant 1 —Messrs *Little & Co*

Attorneys for defendant 2 —Messrs *Mehta and Dalpitram*

Attorneys for defendant 3 —Messrs *Dadachanji and Pocha*

Attorneys for defendants 4 and 5 —Messrs *Jehangir, Gula bhai and Billimoria*

Attorneys for defendant 6 —Messrs *Jehangir, Mehta an Somji*

K McI K

APPELLATE CIVIL

Before Sir Basil Scott Kt Chief Justice and Mr Justice Batchelor

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MANILAL RANCHOD AND ANOTHER (ORIGINAL PLAINTIFFS) APPELLANT v MOTIBHAI HEMABHAI AND OTHERS (ORIGINAL DEFENDANTS RESPONDENTS *

Civil Procedure Code (Act XIV of 1882) sections 268, 274—Usufructuar mortgage—Debt—Immoveable property—Execution of money decree—Attachment

Where a deed of mortgage with possession provided that the mortgagee wa to enjoy the profits in lieu of interest for ten years and was to be redeemed on the expiration of the term by payment of the mortgage money

* Second Appeal No 707 of 1909

Held that the document created a purely usufructuary mortgage

Held, further that in the case of a usufructuary mortgage, there was no debt payable by the mortgagor to the mortgagee which could be attached in execution of a money decree against the assignee of the mortgagee, and that section 268 of the Civil Procedure Code (Act XIV of 1882) was not applicable to such a case The procedure should be by attachment under section 274 of the Civil Procedure Code, of the interest in immoveable property and its sale according to the provisions of the Code

Tarvadi Bholanath v *Bai Kashi*(1), explained

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MANILAL RANCHOD v MOTIBHAI HEMABHAI

SECOND appeal from the decision of J L Thakar, Judge of the Court of Small Causes at Ahmedabad with appellate powers, reversing the decree of M J Yajnik, Subordinate Judge of Umreth

One Bhatha Samal mortgaged a piece of land under a registered mortgage deed, dated the 10th February 1894, to one Shankar Bapuji for Rs 750 The mortgage was with possession and it provided that the mortgagee was to enjoy profits of the land in lieu of interest for a period of ten years and was to be redeemed after the expiration of the term on payment of the mortgage money The mortgagee Shankar Bapuji died in or about November 1902 and on his death his brother Jiva Bapuji got possession of the mortgaged property Jiva's creditor, one Ranchod Hirachand, obtained a money decree, No 460 of 1904, against him, and in execution attached Jiva's rights as mortgagee of the land Thereupon, Jiva made an application stating that his deceased brother Shankar had taken the mortgage with money borrowed from one Hemabhai Dharamdas and that after Shankar's death, having assigned his mortgage rights to the said Hemabhai for the debt, neither he nor his deceased brother had any interest in the property In spite of the said objection raised by Jiva, Ranchod Hirachand caused Jiva's rights as mortgagee to be sold at auction and purchased the same himself for Rs 101 in September 1905 Subsequently, Ranchod Hirachand having died, his sons Manilal and Ambalal brought the present suit in the year 1905 to recover possession of the mortgaged property or to obtain such other relief as the Court might deem proper to grant alleging *inter alia* that on the 1st September

(1) (1901) 26 Bom 45

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MANILAL RANCHOD *v.* MOTIBHAI HEMABHAI

1905 Bhatha Samal sold the mortgaged property with the mortgage burden on it to defendant 1, Pathak Devshankar Sadaram, and that *Hemabhai Dharamdas was joined as one of* the parties, he having purchased from Jiva Bapuji the mortgagee's rights

Defendant 1, Pathak Devshankar Sadaram, answered that he had become the owner of the property in suit under his purchase from Bhatha Samal for Rs 650, that out of the said consideration he paid Rs 73 to his vendor and held the rest for payment to the mortgagee and that he was willing to pay the sum on account of possession to any one to whom the Court would order him to pay

The defence of defendant 2 is immaterial to this appeal

Defendant 3, Jiva Bapuji, contended that he was not in possession and was not a necessary party

Defendant 4, Hemabhai Dharamdas, stated *inter alia* that Jiva sold his rights as mortgagee to the defendant on the 8th April 1906, that the plaintiff, by his auction purchase, acquired no right as his judgment debtor Jiva had no interest in the property then and that the plaintiff purchased the property with notice of that circumstance

The Subordinate Judge found that the plaintiffs' father acquired at the Court-sale held in September 1905 the right, title and interest of Jiva Bapuji as mortgagee of the land in suit, that the mortgage with possession to Shankar Bapuji by Bhatha Samal was proved, that the sale of the equity of redemption by Bhatha Samal to defendant 1 was not proved, that the sale deed dated the 8th April 1906 and passed by Jiva to defendant 4 was proved and that the plaintiffs were entitled to recover possession He, therefore, passed a decree directing the plaintiffs to recover possession

Defendant 4 appealed and he having died during the pendency of the appeal, his son Motibhai was brought on the record The appellate Court reversed the decree and dismissed the suit holding that the plaintiffs had not shown that their father had, by his Court purchase, acquired the right, title and interest of Jiva as mortgagee of the land, for the following reason —

Here the mortgage was with possession and was a usufructuary one which does not give a right for sale of the mortgaged property and the mortgagee was in possession A mortgage with possession and that too a usufructuary one, is beyond doubt, to my mind immoveable property and an interest in immoveable property Such a mortgagee's rights in the mortgaged land should have been attached as immoveable property under section 274 and sold as such and a purchaser of such rights cannot in my opinion prove his title without a sale certificate Here there was no confirmation of the sale by the Court and no issue of a sale certificate

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MANILAL RANCHOD v MOTIBHAI HEMABHAI

The plaintiffs preferred a second appeal

G K Parekh for the appellants (plaintiffs) —The view of the lower Court is erroneous The plaintiffs father purchased the mortgage claim which carried with it the right to the possession of the mortgaged property In a mortgage the principal thing is the debt and the security of the property is only an incident of the debt Therefore the right to the mortgaged property passes with the debt *Baldev Dhanrup Marvadi v Ramchandra Balvant Kulkarni*(1), *Tarvadi Bholanath v Bai Kashi*(2), *Appasami v Scott*(3), *Debendra Kumar Mandel v Rup Lall Dass*(4)

L A Shah for respondent 1 (defendant 4) —The rulings relied on were cases of simple mortgage in which there is an existing debt and the security of the property All cases are discussed in *Tarvadi Bholanath v Bai Kashi*(2), which shows that the principle of the rulings referred to applies only to simple mortgages The cases of a mortgage with possession and a usufructuary mortgage would be quite different and would not be governed by the said rulings

In the present case the mortgage is a purely usufructuary mortgage The mortgagee has no right to demand the debt Section 72 of the Transfer of Property Act is clear on the point The mortgagee has the right to the property only Such an interest is an immoveable property under the General Clauses Act (X of 1897) and the procedure laid down in section 274 of the Civil Procedure Code should have been followed.

(1) (1893) 19 Bom 121
(2) (1901) 26 Bom 305
(3) (1885) 9 Mad [illegible]
(4) (1886) 12 Cal [illegible]

1911

MANILAL LANCHOD v MOTIBHAI HEMABHAI

SCOTT, C J —The respondent 1 is the assignee of the rights of a mortgagee under a mortgage bond executed in the year 1894 The bond created a usufructuary mortgage with possession and provided as follows —

'The field is given in mortgage on receiving on security thereof Rs. 750 The money bears no interest and no rent shall be payable for the field The period is fixed at ten years You may cultivate or sub mortgage the field during this period I have no right thereto After the expiration of the fixed period when I repay the principal sum on the very day and in the very month in which I have received the sum, you may give up the field in Vaishakh in that year You should pay dues, etc, and enjoy the produce If anyone causes obstruction or hindrance then I am to be answerable for the amount due in such manner as you may ask me to be answerable

According to the rulings of this Court that document created a purely usufructuary mortgage and not a mixed mortgage of the character referred to in *Parasharam* v *Pultajirao*[1] It created no debt in respect of which the mortgagor could be sued except in the event of a breach of the covenant for quiet enjoyment contained in the bond This being so there was no debt due from the mortgagor which could be attached under the provisions of section 268 of the Code of 1882 The plaintiffs, however, as the holders of a money decree against the assignor of the respondent 1, purported to attach a debt of Rs 750, due by the mortgagor to the original mortgagee whose representative was the plaintiffs' judgment debtor, and having so attached the so called debt, it was sold in execution and purchased by the plaintiffs

It is contended on behalf of the respondent 1 that the attachment and sale gave the appellants no right to possession of the mortgaged land for which they sue, and that argument found favour with the learned Judge of the lower appellate Court

We are of opinion that the lower Court's decision is correct In the case of a purely usufructuary mortgage where there is no debt payable by the mortgagor, the procedure by attachment under section 268 is inapplicable The procedure should be by *attachment*, under section 274, of the interest in immoveable

(1) (1900) 31 Bom. 129

property and its sale in accordance with the provisions of the Code.

The pleader for the appellants has, however, relied upon the decisions of this Court in *Baldev Dhanrup Marvadi* v *Ramchandra Balvant Kulkarni*[1] and *Tarvadi Bholanath* v *Bai Kashi*[2] in which the decisions of the Madras High Court in *Appasami* v *Scott*[3] and of the Calcutta High Court in *Debendra Kumar Mandel* v *Rup Lall Dass*[4] were followed

It is to be observed, however, that the learned Judges in delivering judgment in *Tarvadi Bholanath* v *Bai Kashi*[2], were careful to point out that their decision was based upon the fact that the mortgagee was a mortgagee under a simple mortgage and was not in possession, and upon that ground the decisions in the other cases which we have been referred to may be distinguished from that now before us

We, therefore, affirm the decree of the lower appellate Court and dismiss the appeal with cost

Decree affirmed

G B R

(1) (1893) 19 Bom 151
(2) (1901) 26 Bom. 305.
(3) (1885) 9 Mad. 5
(4) (1886) 12 Cal. 546

APPELLATE CIVIL.

Before Mr Justice Chandavarkar and Mr Justice Heaton

ANANDIBAI KOM RAM RAI (ORIGINAL PLAINTIFF) APPELLANT v HARI SUBA RAI AND OTHERS (ORIGINAL DEFENDANTS) RESPONDENTS.*

1911 February 21.

Hindu Law—Partition—Partial partition—Reunion.

Out of six co-parceners in a joint Hindu family three separated under a deed of partition from the rest who continued joint as before The Court found on these facts that the last three persons, as they continued as before to be co-parceners or they must be held as having immediately reunited with each other after executing the deed of partition. In appeal it was contended that there was no finding by the Court as to an agreement to reunite or any evidence recorded of such agreement

* Second Appeal No. 690 of 1909

1911

ANANDIBAI
v
HARI SUBA PAI

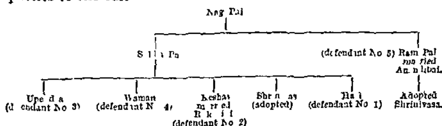
Held overruling the contention that the evidence was that the co parceners agreed to effect not a complete but partial disruption of the co parcenery, that, in other words three of them separated from the rest and also *inter se* and that the latter agreed to continue joint

Per Curiam —According to Hindu Law, he who alleges partition must prove it because once is a partition made If it is proved that there has been a breach in the state of union, the law presumes that there has been a complete partition both as to parties and property The presumption in question continues until it is rebutted by proof of an agreement which means proof of intention on the part of some to remain united as before and to confine the partition to the rest or if the partition was intended to extend to the interest of all individually, there must be proof that some of them re united

SECOND appeal from the decision of T Walker, District Judge of Kanara, confirming the decree passed by K R Natu Subordinate Judge of Kumta

Suit for declaration

The following genealogical tree shows the relationship of parties to the suit —



At first the parties lived as a joint family Ram Pai and Anandibai adopted Shrinivas as their son Then in 1888 there was a partition by which Upendra, Waman and Ram Pai separated from the other three—Hari, Keshav and Shrinivasa the last three remaining joint as before The first three also separated *inter se* Subsequent to the adoption, Ram Pai and Anandibai had a son born to them, who eupon they allotted to their adopted son Shrinivasa one fourth of Ram Pai's share In 1892, Shrinivasa died a bachelor

In 1904, Anandibai filed the present suit for a declaration that she was entitled to the share which Shrinivasa had in the property

The defendants contended *inter alia* that there having been a re-union of Shrinivasa with Hari and Keshav, they were entitled

to his share, and that the plaintiff would not have any right to succeed in preference to Ram Pai, who was defendant No 5

The Subordinate Judge held that the plaintiff had no right to succeed to Shrinivasa in preference to Ram Pai, but as Ram Pai died during the progress of the suit he further found that there was re union between Shrinivasa, Hari and Keshav He dismissed the suit

On appeal, the District Judge only went into the question whether Anandibai had a right to succeed to Shrinivasa, and finding it against her, dismissed her suit This finding was reversed by the High Court and he was asked to dispose of the case on merits *Vide* I L R, 33 Bombay, p 404

On remand, the District Judge found that "Hari, Keshav and Shrinivasa remained joint with each other, or (if the legal fiction is to be employed) must be held as having immediately re-united with each other after executing the partition deed" He again dismissed the plaintiff's suit

The plaintiff appealed to the High Court

S S Patkar for the appellant —Under Hindu Law, re union cannot be proved by presumption, it must be proved as a fact See *Balabux Ladhuram* v *Rukhmabai*[1] Even if re union be regarded as proved in fact, there can be no re union between brothers See Mitakshara, c 2, s 9, pl 3, *Basanta Kumar Singha* v *Jogendra Nath Singha*[2], *Vishvanath Gangadhar* v *Krishnaji Ganesh*[3] and *Lakshmibai* v *Ganpat Moroba*[4]

S V Palekar, for the respondents —The finding of the lower Court is that three of the co parceners remained joint as before, and that finding is one of fact The brothers having agreed to continue joint as before, there was no separation

CHANDAVARKAR, J —The facts found by the lower appellate Court are shortly these Upendra, Waman, Rampai (defendants Nos 3, 4 and 5 respectively), Hari, Keshav and Shrinivasa were members of a joint Hindu family The first three of them separated from the rest under a deed of partition in 1888 (Exhibit 44), the last three continuing joint as before

(1) (1903) L R 30 I A 130
(2) (1905) 33 Cal 371
(3) (1866) 3 Bom H C R A C J [illegible]
(4) (1867) 4 Bom H C R O C J [illegible]

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PAI

On these facts the lower Court has found that the last three persons either continued as before to be co parceners or that they "(if the legal fiction is to be employed) must be held as having immediately re united with each other after executing Exhibit 44

The legal correctness of the latter view as to re union is challenged by the learned pleader for the appellant on the authority of the Privy Council judgment in *Balabux Ladhuram v Rukhmabai*[1] There it was held "that there is no presumption, when one co parcener separates from the others that the latter remained united," but that the agreement to remain united or to re unite "must be proved like any other fact" It is contended that in the present case there is no finding by the appellate Court as to an agreement to re unite and that there is no evidence of such agreement The answer to that contention is simple The evidence is that the co parceners agreed to effect not a complete but partial disruption of the co parcenery, that, in other words, three of them separated from the rest and also *inter se* and that the latter agreed to continue joint The Courts below have found accordingly The finding satisfies the law enunciated by the Judicial Committee of the Privy Council in the case cited

According to Hindu Law, he who alleges partition must prove it because "once is a partition made ' If it is proved that there has been a breach in the state of union, the law presumes that there has been a complete partition both as to parties and property The presumption in question continues until it is rebutted by proof of an agreement, which means proof of intention on the part of some to remain united as before and to confine the partition to the rest, or, if the partition was intended to extend to the interest of all individually, there must be proof that some of them re united In the present case the former was alleged and has been found established by the evidence

The decree must, therefore, be confirmed with costs

Decree confirmed

R R

(1) (1903) I R 30 A 130

APPELLATE CIVIL

Before Sir Basil Scott, Kt Chief Justice, and Mr Justice Batchelor

ABDUL ALLI ABDUL HUSEIN AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS *v* MIAKHAN ABDUL HUSEIN AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS * 1911 *February 21*

Civil Procedure Code (Act XIV of 1882) sections 1 , 44 (b)—Suit by a Mahomedan to recover a portion of a house—Prior suits with respect to other portions—Res judicata—Gift—No estoppel by judgment in suit commenced after the gift—Privity in estate—Misjoinder of causes of action—Costs

A prior donee of property cannot be estopped as being privy in estate by a judgment obtained in an action against the donor commenced after the gift

A Mahomedan plaintiff having first claimed the property in suit as the heir of his father on the ground that his mother had no title to the property which she purported to dispose of by way of gift to the plaintiff's daughter cannot in the same suit contend that his daughter had obtained a good title to the property from his mother and he was entitled to the property as the daughter's father

Mercantile Investment and General Trust Company v *River Plate Trust Loan, and Agency Company*[1], *The Natal Land, &c., Company* v *Good*[2] and *Nasr Ullah Khan* v *Nasir Begam*[3] followed

SECOND appeal from the decision of W Baker, District Judge of Surat, confirming the decree passed by J E Modi, First Class Subordinate Judge

Suit to recover possession of a portion of a house

The house in dispute originally belonged to one Abdul Husen Kamrudin, who, on the 15th April 1870, sold it to his wife Mariamboo but continued himself in possession Abdul Husen died on the 19th October 1884 leaving him surviving his widow Mariamboo, two sons, Esuf Alli and Abdul Alli and one daughter,

* Second Appeal No 801 of 1908

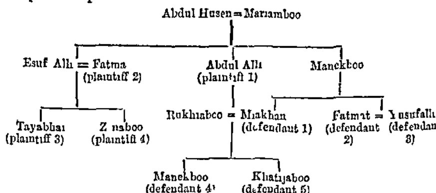
(1) [1894] 1 Ch 578 at p. 595. (2) (1868) L R 2 P C 121 at p 132.

(3) (1892) 15 All. 168

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ABDUL ALLI
v.
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ABDUL
HUSEIN

Manekboo The following genealogical tree explains the relationship of the parties —



On the 29th August 1898 Mariamboo sold the ground floor of the house to Miakhan the son of her daughter Manekboo But that portion being in Abdul Alli s possession, Miakhan brought a suit No 358 of 1900, against Abdul Alli to recover possession, but the Court dismissed the suit holding that the sale deeds in favour of Mariamboo and Miakhan were sham transactions without consideration

In the meanwhile on the 3rd June 1899 Mariamboo executed a deed of gift to her son's daughter Rukhiaboo of the front portion of the second story of the house

Mariamboo herself brought a suit, No 222 of 1900, against her son Abdul Alli to recover possession of the ground floor and part of the first story of the house which were in his possession, but that suit also failed, the Court having held that the sale deed passed to her by her husband was a sham transaction She also filed another suit, No 223 of 1900, against her son Esuf Alli with respect to portions of the first and second stories but that suit also failed for the same reason

In 1903 the plaintiffs, that is, Abdul Alli and the heirs of Esuf Alli brought the present suit against the heirs of Rukhiaboo, the donee under Mariamboo, to recover possession of the front portion of the second story of the house, the subject of the gift

Defendants answered *inter alia* that the sale by Abdul Husen to Mariamboo was not fraudulent and void and that by her purchase she had become full owner of the house

The Subordinate Judge found that the conveyance in favour of Mariamboo was a good and valid transaction, that Mariamboo had become full owner and the gift by her to Rukhiaboo was not invalid and that the decisions in suits Nos 222 and 223 of 1900 were not binding on Rukhiaboo as the gift to her was prior in date and she was not a party to those suits He, therefore, dismissed the suit observing —

The reported dicta of high judicial authorities are to the same effect In Hukumchand s Civil Procedure Code at page 160 it is said, "It is well under stood though not usually stated in express terms in words upon the subject that no one is privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit Dr Bigelow says the ground of privity is property and not personal relation To make a man a privy to an action he must have acquired an interest in the subject matter of the action either by inheritance succession or purchase, from a party, subsequently to the action Pomer J held the same recently in Mercantile Insurance etc *vs* River Plate Co (1894 English Weekly Notes 9), observing that a purchaser could not be estopped being privy in estate by judgment in an action commenced after the purchase

This rule has been followed in India too in the cases in Dooma *v* Joonarain, 12 W R 362 and Bonomalee *v* Koylash Chunder 4 Cal 692 and Krishnaji *v* Sitaram, I L R 5 Bom 496 and Sita Ram *v* Amir Begam I L R. 8 All 324, and Naiz Ullah Khan *v* Nasir Begam 15 All. 108, and Chidden Singh *v* Durga, 23 All. 383 In Sitaram *v* Amir Begam the Court said that section 13 of the Civil Procedure Code must be read as if after the words "under whom they or any of them claim the words "by title arising subsequently to the com mencement of the former suit had been inserted. The case of Naiz Ullah Khan *v* Nasir Begam deserves notice, as there the assignee got his interest under a transfer during the pendency of the suit yet the judgment in that suit was held not to be binding on him

On appeal by the plaintiffs the District Judge confirmed the decree

The plaintiffs preferred a second appeal

Modi with *N K Mehta* for the appellants (plaintiffs)

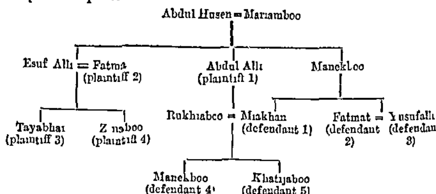
Ratanlal Ranchoddas for the respondents (defendants)

SCOTT, C J —This suit relates to a portion of a house alleged to have been given away by one Mariam, the widow of Abdul Husen Kamrudin, to her grand daughter Rukhiaboo the daughter of Abdul Alli, the first plaintiff, and the wife of the first defendant Miakhan.

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ABDUL ALLI
v.
MIAKHAN ABDUL HUSEIN

Manekboo The following genealogical tree explains the relationship of the parties —



On the 29th August 1898 Mariamboo sold the ground floor of the house to Miakhan the son of her daughter Manekboo But that portion being in Abdul Alli s possession, Miakhan brought a suit, No 358 of 1900, against Abdul Alli to recover possession, but the Court dismissed the suit holding that the sale deeds in favour of Mariamboo and Miakhan were sham transactions without consideration

In the meanwhile on the 3rd June 1899 Mariamboo executed a deed of gift to her son's daughter Rukhiaboo of the front portion of the second story of the house

Mariamboo herself brought a suit, No 222 of 1900, against her son Abdul Alli to recover possession of the ground floor and part of the first story of the house which were in his possession, but that suit also failed, the Court having held that the sale-deed passed to her by her husband was a sham transaction She also filed another suit, No 223 of 1900, against her son Esuf Alli with respect to portions of the first and second stories but that suit also failed for the same reason

In 1903 the plaintiffs, that is, Abdul Alli and the heirs of Esuf Alli brought the present suit against the heirs of Rukhiaboo, the donee under Mariamboo, to recover possession of the front portion of the second story of the house, the subject of the gift

Defendants answered *inter alia* that the sale by Abdul Husen to Mariamboo was not fraudulent and void and that by her purchase she had become full owner of the house

Abdul Husen Kamrudin as his heirs and claimed in respect of his estate That was a clear and definite cause of action

Abdul Alli, the appellant, now complains that he was not allowed to put forward in the same suit a case placed upon an entirely different cause of action, namely, that he was the father of Rukhiaboo, deceased, who obtained a good title to the property in dispute from Mariamboo That cause of action relates to the estate of Rukhiaboo and is put forward by Abdul Alli claiming by derivative title as one of her heirs, and we think, it is clear that the joinder of two such causes of action in respect of two different estates is prohibited by section 44 (*b*) of the Civil Procedure Code of 1882, which was in force at the date of the institution of this suit

The appellant's Counsel suggests that it might possibly be held, if a subsequent suit were instituted by Abdul Alli claiming as the heir of Rukhiaboo, that the matter is *res judicata* as it might and ought to have been put forward as a ground of attack in this suit It is difficult to see how it can be put forward as *res judicata* since *ex hypothesi* the subsequent suit would be between the same parties between whom the Court has decided in this judgment that the claim ought not to be and might not be put forward

The only remaining question is the question of costs The learned Subordinate Judge states correctly that the defendants filed written statements which are identical in their contentions They are all members of the same family the only difference of interest being that some claim as heirs of Rukhiaboo *and others* claim as tenants The Subordinate Judge, however, allowed the tenants one set of costs and the heirs another When the matter went to the lower appellate Court the learned District Judge, although his judgment states that he confirmed the decree of the lower Court and dismissed the appeal with costs, appears to have allowed the decree to be drawn up awarding three separate sets of costs to the defendants

As all the questions in the case are before us in this appeal we are competent to deal with the question of costs, and we are of opinion that the defendants are not entitled to more than one set

1911

ABDUL ALLI v MIAKHAN ABDUL HUSEIN

of costs We therefore vary the decrees of the lower Courts in the matter of costs by allowing only one set to the defendants in each Court In other respects the decree is affirmed

The costs of this appeal must be borne by the appellants

Decree partially varied

G B R

APPELLATE CIVIL

Before Sir Basil Scott, Kt, Chief Justice, and Mr Justice Batchelor

1911 *February* 23

EBRAHIM HAJI YAKUB (ORIGINAL DEFENDANT 5) APPELLANT v CHUNILAL LALCHAND KABRE AND OTHERS (ORIGINAL PLAINTIFFS) RESPONDENTS *

Limitation Act (XV of 1877) section 19—Contract Act (IX of 1872) sections 208 and 209—Suit to recover money—Acknowledgment by defendant's Gumasta *(agent) after his death—Death of the defendant not known to plaintiff—Limitation*

Plaintiffs firm had dealings with one Haji Usman from the 5th January 1901 till the 25th October 1903 Haji Usman's business was managed by a *Gumasta* (agent) Haji Usman died in or about March 1903 and the plaintiffs had no knowledge of his death On the 2nd June 1903 the *Gumasta* wrote to the plaintiffs a post card stating ' you mention that there are moneys due as to that I admit whatever may be found on proper accounts to be owing by me you need not entertain any anxiety ' On the 30th May 1906 the plaintiffs brought a suit against the managers of Haji Usman's estate to recover a certain sum of money on an account stated

The defendants pleaded the bar of limitation on the ground that there was no acknowledgment of the debt by a competent person

Held that the suit was not time barred The *Gumasta's* letter of the 2nd June 1903 was an acknowledgment within the meaning of section 19 of the Limitation Act (XV of 1877)

The case fell within the provisions of sections 208 and 209 of the Contract Act (IX of 1872) The termination of the *Gumasta's* authority if it did terminate, did not take place before the 2nd June 1903 as the plaintiffs did not

* Second Appeal No 371 of 1909

know of the principal s death, and the *Gumasta* was bound under section 209 to take, on behalf of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him

SECOND appeal from the decision of C Fawcett, District Judge of Ahmednagar, confirming the decree of M V Kathavate, First Class Subordinate Judge

Plaintiffs' firm had dealings with one Haji Usman Haji Oomar The dealings continued from the 5th January 1901 till the 25th October 1903 Haji Usman's business was managed by a *Gumasta* Haji Usman died in or about the month of March 1903 The plaintiffs had no knowledge of his death In June 1903 Haji Usman's *Gumasta* wrote a post card to the plaintiffs acknowledging liability on account of the dealings The acknowledgment was as follows —

You mention that there are moneys due to that I admit whatever may be found on proper accounts to be owing by me you need not entertain any anxiety

On the 30th May 1906 the plaintiffs filed the present suit against the defendants to recover Rs 775 due on an account stated The plaint alleged that the defendants were in possession of deceased Haji Usman's estate as *Panch* of his caste and that defendant 1 managed it in consultation with the other defendants The plaint further alleged that there were acknowledgments of the debt in two post cards, dated the 2nd June 1903 and 23rd February 1904, and that the debt was due on current accounts

Defendant 1 answered that he had no presonal knowledge of the debt in suit, that defendant 2 had instituted an administration suit, No 361 of 1903, in the Bombay High Court and that Court had appointed a Receiver on whose report the management of the estate of the deceased was entrusted to the defendant who paid off all the proved debts and discharged defendants 2, 3, 4 and 5 from all liability and that the claim was time barred, there being no acknowledgment of the debt by a competent person

The other defendants raised the same defences to the action

The Subordinate Judge found that the claim was proved and that it was not time-barred He, therefore, awarded the claim

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EBRAHIM HAJI YAKUB v CHUNILAL LALCHAND

On appeal by the defendants, the District Judge confirmed the decree

Defendant 5 preferred a second appeal

P D Bhide for the appellant (defendant 5) —The authority of the *Gumasta* terminated on the death of the principal section 201 of the Contract Act Hence the *Gumasta* had no authority under section 19 of the Limitation Act to acknowledge the debt of the deceased principal An acknowledgment passed after the termination of the authority is of no avail *Parbuttinath Roy* v *Tejomoy Banerji*[1] *Dinonoyi Debi* v *Roy Luchmiput Singh*[2] Explanation 2 to section 19 of the Limitation Act requires that the agent ought to be duly authorized in that behalf and this requirement must be strictly construed The old English Law did not recognize such authority in the agent It was only latterly that power to acknowledge debt was given to a duly authorized agent Banning on Limitation, p 47 (3rd Edn) Section 19 of the Limitation Act requires a strict construction and it cannot be controlled by sections 208 and 209 of the Contract Act These latter sections are meant only to protect the agent in his dealings with others but are not meant to make such acknowledgment binding on the representatives when it is made on the principal's death It cannot be said that the acknowledgment in the present case was made for the protection of the interest of the deceased principal

D R Patvardhan for the respondents (plaintiffs) —The acknowledgment passed by the *Gumasta* was valid Section 208 of the Contract Act provides that the termination of authority does not take effect till the third person knows of the death of the principal In the present case the *Gumasta* was found to have full authority and the representatives of the deceased principal seemed to have authorized all the dealings of the *Gumasta*

SCOTT, C J —It is admitted that the defendant 1, by an order of the Court made in an administration suit, is the manager

(1) (1879) 5 Cal 207 (2) (1879) L R 7 I A 8

of the property of Haji Usman Haji Oomar who died in or about March 1903

The plaintiffs firm had dealings with Haji Usman's firm at Malegaon The business of that firm, according to the finding of the lower Court, was, during the life time of Haji Usman, carried on by a *Gumasta* named Khanderao

The suit was instituted by the plaintiffs on the 30th of May 1906 by presenting the plaint to the officer of the Court at Ahmednagar In order that the plaintiffs may not be met by a bar of limitation they have to show that there was some acknowledgment binding upon the estate given under section 19 of the Limitation Act within the three years anterior to the 30th of May 1906 The acknowledgment relied upon for this purpose is dated 2nd of June 1903 It is in the shape of a post card addressed to the plaintiffs by the *Gumasta* Khanderao from Malegaon in the name of Haji Usman Haji Oomar in which no reference is made to the death of the latter It purports to be an answer to a letter from the plaintiffs relating to their account and concludes by saying "you mention that there are moneys due, as to that I admit whatever may be found on proper accounts to be owing by me, you need not entertain any anxiety"

The learned Judge of the lower appellate Court has held that there was no reason to suppose that the plaintiffs at this time knew that Khanderao's authority had terminated by the death of Haji Usman, and it is not alleged that they had notice of his death at that time assuming the authority of the writer of the letter to give acknowledgment had terminated

It appears from the decision of the Privy Council in *Maniram Seth* v *Seth Rupchand*[1] that an acknowledgment in terms such as we have referred to would be an acknowledgment within the meaning of section 19

The question, then, is whether the *Gumasta* Khanderao, who was in charge of the business on the 2nd of June 1903, could bind the estate of Haji Usman who died two months previously

(1) (1906) 33 Cal 1047

1911.

Ebrahim Haji Yakub v. Chunilal Lalchand

The learned Judge has held that there is a strong presumption in favour of the arrangement which existed in Haji Usman's time as deposed to by the witness Khanderao having continued with, at any rate, the implied authority of Haji Usman's legal representatives, so far as to cover the acknowledgment of the 2nd of June

According to the evidence of Khanderao and a number of letters which were proved in the case, he carried on business for his master and generally managed the affairs of the firm, and his master always allowed him to write letters on behalf of the firm and never repudiated any of them

Under these circumstances, we think, that the case falls within the provisions of sections 208 and 209 of the Contract Act The termination of Khanderao's authority, if it did terminate, did not take effect as regards plaintiffs before the 2nd of June as they did not know of Haji Usman's death, and Khanderao was bound under section 209 to take on behalf of the representatives of his late principal all reasonable steps for the protection and preservation of the interests entrusted to him The post card written on the 2nd of June was, we think, a reasonable letter for the manager to write to a creditor who was inquiring about the moneys due to him, and was written for the protection and preservation of the assets of the shop We therefore, hold that the suit was not barred by limitation

We affirm the decree of the lower appellate Court and dismiss the appeal with costs

Decree affirmed

G. B. R.

APPELLATE CIVIL

Before Mr Justice Chandavarkar and Mr Justice Heaton

TRIMBAK KASHIRAM SHIMPI AND ANOTHER (ORIGINAL PLAINTIFFS) APPELLANTS *v* ABAJI VALAD CHIMNAJI PATEL KHUDL AND OTHERS (ORIGINAL DEFENDANTS) RESPONDENTS * 1911 February 23

Construction of statute—Repeal—Civil Procedure Code (Act XIV of 1882), section 257A—Civil Procedure Code (Act V of 1908) repealing section 257A—Effect of the repeal on section 13 clause (c) † of the Dekkhan Agriculturists' Relief Act (XVII of 1879)

Section 13, clause (c) of the Dekkhan Agriculturists Relief Act (XVII of 1879) not having been expressly repealed is not affected by the repeal of section 257A of the Civil Procedure Code, 1882 by the Civil Procedure Code of 1908

SECOND appeal from the decision of Gulabdas Laldas Nanavati, First Class Subordinate Judge, A P, at Nasik, varying the decree passed by R K Bal, Subordinate Judge of Sinnar

The plaintiff filed this suit to recover the money due on a mortgage, which was passed to him by the defendants for Rs 938 6 4

The defendants in their written statements admitted the genuineness of the deed, but pleaded that they were agriculturists and asked for accounts to be taken as provided by the Dekkhan Agriculturists' Relief Act, 1879, and prayed for instalments

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* Second Appeal No 311 of 1910

† The material portions of the section run as follows :—

13 When the Court enquires into the history and merits of a case under section 12, it shall—

* * * *

open the account between the parties from the commencement of the transactions and take that account according to the following rules (that is to say) :—

* *

(c) in the account of principal there shall not be debited to the debtor any money which he may have agreed to pay in contravention of section 257A of the Code of Civil Procedure

1911.

Ebrahim Haji Yakub v. Chunilal Lalchand

The learned Judge has held that there is a strong presumption in favour of the arrangement which existed in Haji Usman's time as deposed to by the witness Khanderao having continued with, at any rate, the implied authority of Haji Usman's legal representatives, so far as to cover the acknowledgment of the 2nd of June

According to the evidence of Khanderao and a number of letters which were proved in the case, he carried on business for his master and generally managed the affairs of the firm, and his master always allowed him to write letters on behalf of the firm and never repudiated any of them

Under these circumstances, we think, that the case falls within the provisions of sections 208 and 209 of the Contract Act The termination of Khanderao's authority, if it did terminate, did not take effect as regards plaintiffs before the 2nd of June as they did not know of Haji Usman's death, and Khanderao was bound under section 209 to take on behalf of the representatives of his late principal all reasonable steps for the protection and preservation of the interests entrusted to him The post card written on the 2nd of June was, we think, a reasonable letter for the manager to write to a creditor who was inquiring about the moneys due to him, and was written for the protection and preservation of the assets of the shop We therefore, hold that the suit was not barred by limitation

We affirm the decree of the lower appellate Court and dismiss the appeal with costs

Decree affirmed

G B R

APPELLATE CIVIL

Before Mr Justice Chandavarkar and Mr Justice Heaton

TRIMBAK KASHIRAM SHIMPI AND ANOTHER (ORIGINAL PLAINTIFFS) APPELLANTS *v* ABAJI VALAD CHIMNAJI PATEL KHUDL AND OTHERS (ORIGINAL DEFENDANTS) RESPONDENTS* 1911 *February* 23

Construction of statute—Repeal—Civil Procedure Code (Act XIV of 1882), section 257A—Civil Procedure Code (Act V of 1908) repealing section 257A—Effect of the repeal on section 13 clause (c)† of the Dekkhan Agriculturists' Relief Act (XVII of 1879)

Section 13 clause (c) of the Dekkhan Agriculturists Relief Act (XVII of 1879) not having been expressly repealed is not affected by the repeal of section 257A of the Civil Procedure Code, 1882 by the Civil Procedure Code of 1908

SECOND appeal from the decision of Gulabdas Laldas Nanavati, First Class Subordinate Judge, A P, at Nasik, varying the decree passed by B K Bal, Subordinate Judge of Sinnar

The plaintiff filed this suit to recover the money due on a mortgage, which was passed to him by the defendants for Rs 938 6 4

The defendants in their written statements admitted the genuineness of the deed, but pleaded that they were agriculturists and asked for accounts to be taken as provided by the Dekkhan Agriculturists' Relief Act, 1879, and prayed for instalments

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Second Appeal No 311 of 1910

† The material portions of the section run as follows —

13 When the Court enquires into the history and merits of a case under section 12 it shall—

* * * * *

open the account between the parties from the commencement of the transactions and take that account according to the following rules (that is to say) :—

* * *

(c) in the account of principal there shall not be debited to the debtor any money which he may have agreed to pay in contravention of section 257A of the Code of Civil Procedure

1911

TRIMBAK KASHIRAM v ABAJI

The Subordinate Judge found that a part of the consideration for the mortgage deed was a decretal debt, and though the sanction of the Court under section 257A of the Civil Procedure Code of 1882 for its incorporation in the mortgage was not taken, the whole consideration remained valid, as section 257A was repealed by the new Civil Procedure Code of 1908, and section 13, clause (c) of the Dekkhan Agriculturists' Relief Act, 1879, became therefore inoperative He, therefore, took accounts and found Rs 1,330 4 0 remaining due on the mortgage, for which he passed a decree in the plaintiff's favour

The First Class Subordinate Judge, on appeal, came to the conclusion that section 13, clause (c) not having been expressly repealed, was not affected by the repeal of section 257A He therefore held that so much of the consideration of the mortgage as offended against the section should be excluded if it was severable, and accounts taken of the remainder Taking the accounts, on that basis, he found Rs 480 due on the mortgage, which he made payable in six equal annual instalments

The plaintiff appealed to the High Court

D R Patvardhan, for the appellants —Section 257A of the Civil Procedure Code (Act XIV of 1882) does not apply to this case The section is repealed by the new Civil Procedure Code of 1908 The repeal has the effect of repealing by implication, section 13 (c) of the Dekkhan Agriculturists Relief Act, 1879

R R Desai, for the respondents —The present suit was filed when the Civil Procedure Code of 1882 was in force, it is therefore governed by that Code and not by the Civil Procedure Code of 1908 Moreover section 13, clause (c) of the Dekkhan Agriculturists' Relief Act, 1879, involves a question of right and is not merely procedural See *Fatmabibi* v *Ganesh*[1]

Further, even if the Code of 1908 were held to apply, the repeal of section 257A of the Code of 1882 cannot affect section 13, clause (c) of the Dekkhan Agriculturists' Relief Act, 1879 See Maxwell on the Interpretation of Statutes, 3rd edition,

(1) (1907) 31 Bom 630

pp 590 591, *Reg* v *Stock*[1] *Reg* v *Inhabitants of Merioneth shire*[2], *Reg* v *Smith*[3], *Clarke* v *Bradlaugh*[4], section 158 of the Civil Procedure Code of 1908, and the General Clauses Act (X of 1897), section 6 clauses (c) and (e)

D R Patvardhan was heard in reply

CHANDAVARKAR J —The question is whether section 13 (c) of the Dekkhan Agriculturists' Relief Act must be regarded as repealed in consequence of the repeal of section 257A of the old Code of Civil Procedure (Act XIV of 1882) by the new Code (Act V of 1908) That section of the Dekkhan Agriculturists' Relief Act incorporates by reference section 257A of the old Code, and it is argued by Mr Patvardhan for the appellant that its repeal has the effect of repealing section 13, clause (c) of the Act also But in the words of Brett, L J, in *Clarke* v *Bradlaugh*[4] "Where a statute is incorporated by reference into a second statute, the repeal of the first by a third does not affect the second" See also Maxwell on Statutes, 3rd edition, p 590

For these reasons, the decree must be confirmed with costs

Decree confirmed

R R

(1) (1838) 8 A & E 405

(2) (1844) 6 Q B 343

(3) (1873) L R 8 Q B 146

(4) (1881) 8 Q B D 63 at p 69

APPELLATE CIVIL

Before Mr Justice Chandavarkar and Mr Justice Heaton

1911 *February 28*

GOVINDRAO NARHAR PINGLE (ORIGINAL DEFENDANT—JUDGMENT DEBTOR) APPELLANT, *v* AMBALAL MOHANLAL (ORIGINAL PLAINTIFF—DECREE HOLDER) RESPONDENT *

Dekkhan Agriculturists Relief Act (XVII of 1879) section 15 B †—Power to order payment by instalments—Decree—Award on arbitration out of Court

A decree was passed in terms of an award which was arrived at on arbitration out of Court On proceedings being taken to execute the decree the judgment debtor applied to the Court for an order to make the decretal amount payable by instalments under section 15 B of the Dekkhan Agriculturists Relief Act, 1879 —

Held that the Court had no power to make any order as to instalments under section 15 B of the Dekkhan Agriculturists Relief Act 1879 which did not apply, inasmuch as the application to file the award was not a suit of the description mentioned in section 3 clause (y), of the Act

Mohan v Tukaram(1) and *Ghulam Jilani v Muhammad Hassan*(2) commented on

PROCEEDINGS in execution

The decree under execution was passed in 1896, in terms of an award published by arbitrators on reference without the intervention of Court whereby Rs 7,001 was found due on a mortgage

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* First Appeal No 91 of 1910

† The Dekkhan Agriculturists Relief Act (XVII of 1879), section 15 B, runs as follows —

(1) The Court may in its discretion in passing a decree for redemption, foreclosure or sale in any suit of the descriptions mentioned in section 3 clause (y) or clause ( ) or in the course of any proceedings under a decree for redemption foreclosure or sale passed in any such suit whether before or after this Act comes into force direct that any amount payable by the mortgagor under that decree shall be payable in such instalments on such dates and on such terms as to the payment of interest, and where the mortgagee is in possession as to the appropriation of the profits and accounting therefor as it thinks fit

(1) (1895) 21 Bom 63 (2) (1901) L. R. 29 I A 51 at p 58

In 1908, the decree holder applied to the Court to execute the decree The judgment debtor, being an agriculturist, also applied to the Court to make the decretal amount payable by instalments, under the provisions of section 15 B of the Dekkhan Agriculturists Relief Act, 1879

The Court found that the amount payable under the decree on the 22nd November 1909, was Rs 11,692-12 9 It ordered the judgment-debtor to pay Rs 2,692 12 9 to the decree holder in part payment of the decree, and on such payment the mortgaged property to be restored to the judgment debtor The remaining amount of Rs 9,000 was made payable in annual instalments of Rs 1,000 each

The judgment debtor appealed to the High Court contending that the lower Court was wrong in ordering the payment of Rs 2,692 12 9 prior to the delivery of possession and that the amount of instalments was too high The decree holder filed cross objections contending that the lower Court erred in making the order as to instalments

Coyaji with *N V Gokhale*, for the respondent, in support of cross objections —A decree passed in terms of an award is not a decree in a suit of the nature mentioned in clauses (*y*) and (*z*) of section 3 of the Dekkhan Agriculturists' Relief Act, 1879 To such a decree, the provisions of section 15 B of the Act cannot apply see *Mohan* v *Tukaram* and *Gangadhar Sakharam* v *Mahadu Santaji*(1)

Jayakar, with *P P Khare*, for the appellant, in reply —The decree in question is a decree for sale on failure to pay redemption money and as such is a decree contemplated by clauses (*y*) and (*z*) of section 3 of the Dekkhan Agriculturists' Relief Act Referred to *Ghulam Jilani* v *Muhammad Hassan*(3)

CHANDAVARKAR, J —So far as the appeal is concerned, it must fail We disposed of the points argued in the course of the hearing

The cross objections of the respondent must be allowed for the following reasons

(1) (1895) 21 Bom 63 (1893) 8 Bom 20

(3) (1901) L R I A 51 at p. 68

1911

GOVINDRAO NARHAR v. AMBALAL MOHANLAL.

The appellant, who is found by the lower Court to be an agriculturist within the meaning of that term as defined in the Dekkhan Agriculturists' Relief Act, had an award made against him and in favour of the respondent by arbitrators on reference without the intervention of the Court on a mortgage, with directions as to payment of the mortgage money and sale in case of failure to pay The award was filed in Court by the respondent and a decree made in its terms The respondent having applied for execution of the decree, the appellant prayed for relief under section 15 B of the Act The lower Court granted the prayer

It is now contended before us by the respondent, in support of his cross objections to the decree, that the Court had no power to act under section 15 B, because (it is urged) the original decree, of which execution was sought, having been passed on an award, is not a decree in a suit for sale as contemplated by that section read along with section 3, clause (y), of the Act In support of that contention the respondent's counsel relies on the decision of this Court in *Mohan* v *Tukaram*[1], where it was held that an application under section 525 of the Code of Civil Procedure (Act XIV of 1882) to file an award, to which agriculturist-debtors are parties, is not a suit within the meaning of sections 3, 12, or 47 of the Dekkhan Agriculturists' Relief Act The appellant's pleader, on the other hand, replies that the decision in question should no longer be regarded as good law binding on this Court, having regard to the judgment of the Judicial Committee of the Privy Council in *Ghulam Jilani* v *Muhammad Hassan*[2], where their Lordships say, of an award made by arbitrators on reference by parties without resort to litigation, that "proceedings described as a suit and registered as such must be taken to bring the matter" under the cognizance of the Court, and that the order made thereon is a 'decree' within the meaning of the expression in the Civil Procedure Code

It is to be remarked at the outset that the reasoning of the judgment of this Court in *Mohan* v *Tukaram*[1] proceeds partly on the consideration that the procedure laid down in the Civil Procedure Code with reference to an application to file a private

(1) (1896) 21 Bom 63

(2) (1901) L R 29 I A 51 at p 68

award is different from that prescribed for the hearing of an ordinary suit But though the procedure varies, the result is the same in one respect In either case the Court passes a decree And a decree, as defined in the Code, is a final adjudication on the rights of the parties in *a suit* That makes a proceeding, which ends in a decree in terms of a private award filed in Court, a suit

To that extent the reasoning of the judgment in *Mohan* v *Tukaram*[1] is fairly open to criticism But a careful examination of the judgment with reference to the point, which the Court had to decide, shows that that reasoning was not necessary for the actual decision, and that the broad conclusion from that reasoning—viz, that an application to file an award is not a suit within the meaning of the term in the Code of Civil Procedure—is an *obiter dictum*

If we look to the actual point decided by the judgment in question and to that part of the reasoning in it, which was necessary to support it, no inconsistency will be found between *Mohan* v *Tukaram*[1] and the Privy Council decision in *Ghulam Jilani* v *Muhammad Hassan*[2]

What the Court had to decide in *Mohan* v *Tukaram*[1] was, whether a private award, to which agriculturist debtors are parties, can be filed by Civil Courts without adjusting the account under the Dekkhan Agriculturists Relief Act For that purpose the Court had to consider whether such an application was a suit within the meaning of sections 3, 12, or 45 of the Act

That was the narrow question for decision It was whether an application to file an award was a suit of the kind contemplated by the Act

The latter portion of the judgment in *Mohan* v *Tukaram*[1] examines some of the sections of the Act to answer it Section 47 (mistaken in the judgment apparently for section 43) enables parties to refer their dispute through a conciliator to arbitration According to the Act, effect has to be given by the Court to the

(1) (1895) 21 Bom 63. (2) (1901) L. R 29 I A 51 at p. 58

1911

GOVINDRAO NARHAR v AMBALAL MOHANLAL

award without scrutiny (section 45) Section 12 requires the Court to give effect to an agreement to refer a dispute to arbitration, when the parties are before the Court, and to file it under section 522 of the Code of Civil Procedure (Act XIV of 1882) From these provisions the judgment proceeded to draw its conclusion in the following words —"If the Legislature has thus thought fit to preserve the full effects of an award in the case of a reference to arbitrators made after proceedings begun, there is, we think, no reason for presuming that it had a contrary intention in the case of a reference and award prior to such proceedings We think we ought to follow the ruling in *Gangadhar Sakharam* v *Mahadu Santaji*[1], and hold that the award should be filed without inquiry under section 12"

In other words, the Court is not empowered by the Dekkhan Agriculturists' Relief Act to reopen an award made on a private reference and go behind it for the purpose of taking accounts between the parties and pass a fresh decree under the Act That is the point of the decision in *Mohan* v *Tukaram*[2] following *Gangadhar Sakharam* v *Mahadu Santaji*[1] and the ground necessary and sufficient to support it as given in the judgment consists in the scheme and intention of the Act, according to which an application to file such an award is not a suit of the kind contemplated by it

This ground is, I think, unassailable If, according to the scheme and intention of the Dekkhan Agriculturists' Relief Act, a private award must be given effect to by the Court when it is filed and a decree passed on it without reference to the provisions of the Act as to examination of the merits of the case from the commencement of the transactions between the parties, and as to the taking of an account between them, it would be nullifying the scheme and intention of the Legislature to hold that an application to file such an award is a suit of the kind contemplated by the Act

The principle of *Mohan* v *Tukaram*[2] and *Gangadhar Sakharam* v *Mahadu Santaji*[1] so far is not touched by the judgment of

(1) (1883) 8 Bom 20 (2) (1895) 21 Bom 63

the Privy Council The Dekkhan Agriculturists' Relief Act has been amended in some respects since both *Gangadhar Sakharam* v *Mahadu Santaji*[1] and *Mohan* v *Tukaram*[2] expounded the law in 1883 and 1895 respectively, and yet the Legislature has not modified the Act so as to show that the law in question is contrary to its intention

That principle applies to the present case Here we have a decree for sale passed in terms of a private award filed in Court on application Such an application may be a suit, but it is not a suit for sale within the meaning of clause (*y*) of section 3 of the Dekkhan Agriculturists' Relief Act, because a suit for sale contemplated by the Act is one in which the Court is required to do certain things, which the Act by necessary implication forbids in the case of applications to file private awards

On these grounds the lower Court's decree must be reversed and the *darkhast* remanded for fresh hearing and disposal Appellant to pay the costs of this appeal and cross objections to the respondents Other costs of the *darkhast* to be costs at the fresh hearing

HEATON, J —The appellant, the judgment debtor, asks for a decree more favourable to him than that modified by the First Class Subordinate Judge of Poona, but I see no good reason to suppose that the discretion exercised by the First Class Subordinate Judge was erroneously or even injudiciously exercised Therefore I would dismiss the appeal with costs

The respondent submits by way of cross objections that the Subordinate Judge had no power under section 15 B of the Dekkhan Agriculturists' Relief Act to alter the decree His reason is that the decree was not obtained in a suit for redemption, foreclosure or sale of the descriptions mentioned in section 3, clause (*y*) or clause (*z*) of the Dekkhan Agriculturists' Relief Act If there was not such a suit, then section 15 B does not apply and the Subordinate Judge had no authority to alter the decree

The decree was obtained on an award the result of arbitration out of Court The present decree-holder made an appli

(1) (1883) 8 Bom. 20 (2) (1895) 21 Bom 63

1911

GOVINDRAO NARHAR v. AMBALAL MOHANLAL

cation to have the award filed It was filed and a decree in its terms was made It is this decree which the First Class Subordinate Judge, purporting to act under the authority given by section 15 B of the Dekkhan Agriculturists' Relief Act, has modified

The award related to a mortgage debt and provided how that debt was to be discharged It has become a decree and is substantially, it is said, a mortgage decree or a decree such as is made in a mortgage suit This I will admit, for though it is not in form a decree which could be made under the Transfer of Property Act and perhaps not strictly in the form of a decree which could be made under the provisions of the Dekkhan Agriculturists' Relief Act, it is in substance the adjustment or settlement of a mortgage debt Nevertheless the suit in which that decree was obtained was not a suit of the descriptions mentioned in section 3, clause (y) or (z) of the Dekkhan Agriculturists' Relief Act The suit was a suit to file an award That is how the suit can be and must be described It cannot be described as a suit for foreclosure, or for the sale of property or for redemption, and it is the description of the suit with which we are concerned But in substance also there is no similarity between a suit to file an award even though the award relates to the discharge of a mortgage debt, and a suit for foreclosure, sale or redemption In the former the Court is not asked to and does not determine the amount of the mortgage debt or the conditions on which or the way in which that debt is to be discharged All these matters are determined out of Court and the *Court only has to decide, if the question be raised,* whether there was an award which the law regards as binding In the latter kind of suit the Court goes into the relations existing between mortgagee and mortgagor, determines the amount of the mortgage debt, and how it is to be discharged

To me the two suits are essentially different, not alike either in description or in form or in nature Therefore I would set aside the order of the First Class Subordinate Judge and allow the cross-objections with costs

1911

GOVINDRAO NARHAR v. AMBALAL MOHANLAL.

I have not based my decision on the argument that an application to file an award is not a suit as was held in the case of *Mohan v. Tukaram*[1], for there are difficulties in the way of following that decision in consequence of the observations of the Privy Council in the case of *Ghulam Khan v. Muhammad Hassan*[2]. Whether the difficulties are insuperable it does not seem to me to be necessary here to enquire.

Decree reversed.

R. R.

(1) (1895) 21 Bom. 63.   (2) (1901) 29 Cal. 167; L. R. 29 I. A. 58.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

LAKMIDAS KHUSHAL (ORIGINAL PLAINTIFF), APPELLANT, v. BHAIJI KHUSHAL AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.* 1911 *March 7.*

Practice—Subordinate Judge—Personal view of disputed premises—Appreciation of evidence based on the personal view.

The plaintiff in a suit to establish easement of passing his rain water over the defendants' field, tried to make out his right by the evidence of his witnesses who deposed that the passage for the rain water had all along existed and was still visible to the eye. The Subordinate Judge visited the spot in question at the request of both parties, to test the veracity of the witnesses, but, finding that there was no passage at the spot he disbelieved the witnesses and dismissed the suit. On appeal it was contended that the Subordinate Judge had wrongly decided the case because he had disposed of it, not by appreciating the evidence but by the light of his own view of the passage:—

Held, that there was no error in the procedure adopted by the Subordinate Judge.

SECOND appeal from the decision of Vadilal Tarachand Parekh, First Class Subordinate Judge, A. P., at Broach, confirming the decree passed by P. C. Desai, Subordinate Judge at Wagra.

Suit to establish the right to an easement.

The plaintiff filed this suit alleging that he had the right of passing the rain water on his land, over the adjoining field

* Second Appeal No. 935 of 1909.

1911

LAKMIDAS KHUSHAL v BHAIJI KHUSHAL

belonging to the defendants, to the main water course on the other side of the defendants' field He alleged that the defendants had put up an embankment on their land which prevented the rain water from passing and, therefore, prayed for an order directing the defendants to remove the embankment, and for a permanent injunction restraining the defendants from obstructing the passage of the water

The defendants denied the plaintiff's right to pass the rain water and contended that it never passed through his field

In support of his case, the plaintiff examined four witnesses who all deposed that the passage of water had existed all along and was still visible to the eye

To test the veracity of the witnesses, the Subordinate Judge visited the spot in question at the request of both parties Finding on personal inspection of the land that there were no traces of the passage deposed to by the witnesses, the Subordinate Judge disbelieved them and dismissed the plaintiff's suit

On appeal, this decree was confirmed by the lower appellate Court

The plaintiff appealed to the High Court

L A Shah for the appellant, relied on the cases of *Joy Coomar v Bundhoo Lall*[1], *Dwarka Nath Sardar v Prosunno Kumar Hajra*[2], *Moran v Bhagbat Lal Saha*[3], *London General Omnibus Company, Limited v Lavell*[4], and *Kessowji Issur v G I P Railway Company*[5]

G N Thakore, for the respondent, replied on the cases

CHANDAVARKAR, J —The point of law urged in this second appeal, in my opinion, fails The parties are the owners respectively of two fields which are opposite to each other Plaintiff, the present appellant, is owner of Survey No 88, and defendants own Survey No 87 The two properties are separated by a narrow passage The plaintiff alleged that water from his

(1) (168-) 9 Cal. 363
(2) 1897) 1 C W N C32
(3) (190-) 23 Cal 133
(4) [1901] 1 Ch 1 -
(5) (1907) 31 Bom 381

field passed on from its south-west corner to the narrow passage, that thence it flowed on to the defendants' field and that there it ran along a well-defined passage The plaintiff complained that the defendants had obstructed this latter passage by raising an embankment so as to prevent the water entering his field The defendants denied the existence of any such passage for water in the field So the question at issue was whether there was or had been any such passage as alleged by the plaintiff Witnesses examined on behalf of the plaintiff deposed that the passage in dispute had existed all along and was still visible to the eye

Both parties thereupon requested the Subordinate Judge to visit the spot and see for himself whether the passage was still visible to the eye Accordingly the Subordinate Judge visited the spot and in the presence of the pleaders of the parties satisfied himself that the passage in question was not visible, and, therefore, he disbelieved the plaintiff's witnesses and disallowed the claim without examining any of the defendants' witnesses

The plaintiff appealed to the District Court and contended that the Subordinate Judge had wrongly decided the case, because he had disposed of it, not by appreciating the evidence, but by the light of his own view of the passage The appellate Court disallowed the contention, holding that the Subordinate Judge was "at liberty to see the disputed property," that it was necessary for him to see it, and that, having seen it in the presence of the pleaders of the parties, he was warranted in forming his own opinion on the case

In second appeal the same contention is repeated before us, and reliance is placed by the appellant's pleader on some decided cases particularly on the judgment of the Judicial Committee of the Privy Council in *Kessowji Issur v G I P Railway Company*[1] The other cases cited are *Joy Coomar v Bundhoo Lall*[2], *Dwarka Nath Sardar v Prosunno Kumar Hajra*[3], and *Moran v Bhagbat Lal Saha*[4] It is urged on the strength of these authorities that the trial Judge has erred

(1) (1907) 31 Bom. 381
(2) (1882) 9 Cal. 363
(3) (1897) 1 C. W. N. 632
(4) (1905) 33 Cal. 133

1911

LAKMIDAS KHUSHAL v. BHAIJI KHUSHAL.

in two respects, first, that he put his view in the place of the evidence, which the law did not warrant, and, secondly, that he decided the case without putting on record the result of his view, so as to give the plaintiff an opportunity of meeting the impressions formed by the Judge by his inspection. None of the cases which have been cited has any cogent relevancy to the question which we have to decide here. All that was held in those cases is that a Judge ought not to substitute his view for the evidence in the case tried by him, that when he visits a spot and makes observations for himself, the result of those observations must be used by him only for the purpose of understanding the evidence, that in fact he should not ignore the evidence as if he had not heard it and dispose of the case merely by the light of what he saw on personal inspection. That law applies where the case is obscure and the evidence can be best understood by a personal view. As was said in *London General Omnibus Company, Limited* v. *Lavell*[1] in such cases "a view is for the purpose of enabling the tribunal to understand the questions that are being raised, to follow the evidence, and to apply the evidence." But there are cases of a different kind, cases where, as remarked by Farwell, J., in *Bourne* v. *Swan & Edgar, Limited*[2] "it is the eye sight of the Judge that is the ultimate test." In the present case the witnesses examined for the plaintiff deposed that the passage, as to which there was a dispute, was still visible to the eye and that it could be seen at any moment by anyone visiting the spot and, therefore, the parties asked the Subordinate Judge to apply the most satisfactory test available, *viz.*, to go to the field and see for himself whether the witnesses for the plaintiff were speaking the truth or not. Accordingly the Judge visited the spot. In other words, the Judge was asked by the parties to act upon the legal maxim *res ipsa loquitur* (the thing speaks for itself). As is pointed out by the commentators of Best on Evidence, a jury is competent to take into consideration the *locus in quo* or to view the premises. The Privy Council decision in *Kessowji Issur* v. *G. I. P. Railway Company*[3] turns upon a different

(1) [1901] 1 Ch. 135 at p. 139. (2) [1903] 1 Ch. 211 at p. 225.
(3) (1907) 31 Bom. 381.

set of facts altogether There what their Lordships decided was that the High Court had acted illegally in deciding the question as to an event which had taken place one evening by the light of what the Judges had seen on another evening amidst possibly different surroundings That cannot be said to have been the case here Here the Subordinate Judge was told that there was a passage which existed, and which had *always* existed, and which could be seen *at any moment* by the eye The eye was the Judge and the case is governed by the principle of law enunciated by Farwell, J, in the case above mentioned on the authority of some cases decided by the House of Lords Therefore, in my opinion, there was no error in the procedure adopted by the Subordinate Judge and there is no law which bound him to record his view and explain it to the parties before deciding the case The decree must be confirmed with costs

HEATON, J —I agree that the decree must be confirmed with costs It does, however, seem to me that the first Court, the Subordinate Judge, has written a judgment, which is open to a good deal of criticism Because from the way in which he has expressed himself he has given ground for the argument that he substituted his own impressions derived from the local inspection of the place, for the evidence in the case But the result of the argument has been to convince me that in effect he has not done this, but has only used the circumstances which were perceived at the local investigation for the purpose of understanding and appreciating the evidence As the result of discussion the objection taken on behalf of the appellant ultimately resolved itself into this that the Judge had not recorded in writing the circumstances observed at the inspection, and the parties consequently had not had an opportunity of discussing those circumstances and dealing with them in so far as they affected the case I think there is this in the objection that it would be much better that the Judge should record the circumstances which are observed at a local inspection In so saying I must emphatically add that I think he should record only facts and not impressions or inferences from facts.

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LAKMIDAS KHUSHAL v. BHAIJI KHUSHAL.

But when a local inspection takes place we know that in the ordinary course of events the salient circumstances are pointed out on the spot and are discussed on the spot, and there is nothing in the case to suggest that the ordinary course of events was not followed here. I assume that it was followed, and as a consequence I find that the defect in not recording the circumstances in writing is a purely formal defect, which could not have misled the parties or caused injustice in the case. For these reasons I think the appeal must be dismissed and the decree confirmed with costs.

Decree confirmed.

R. R.

APPELLATE CIVIL

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1911
March 9.

BHIWA BIN JOTIBA (ORIGINAL PLAINTIFF), APPELLANT, v. DEVCHAND BECHAR (ORIGINAL DEFENDANT No. 1), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), section 462—Minor—Compromise—Sanction of Court not obtained—Compromise not binding on minor.

When a suit, to which a minor is a party, is compromised and no leave of the Court is obtained under section 462 of the Civil Procedure Code (Act XIV of 1882) the compromise does not bind the minor and is voidable. The fact that it is for the benefit of the minor or that he has derived benefit from it makes no difference.

SECOND appeal from the decision of R. D. Nagarkar, Joint First Class Subordinate Judge, A. P., at Poona, reversing the decree passed by L. Reuben, Subordinate Judge at Haveli.

Suit for redemption.

The plaintiff sued to redeem a mortgage that was executed by his father Jotiba Kamte in favour of Devchand Bechar (defendant No. 1) for Rs. 199-15-0 on the 23rd May 1893.

In 1901, Maruti (another son of Jotiba) on behalf of himself and as next-friend of his minor brother (the plaintiff) sued the defendant to redeem the mortgage. The suit was compromised,

* Second Appeal No. 531 of 1909.

1911

DHIWA v. DEVCHAND BECHAR

and Rs 300 were acknowledged to be due to defendant No 1 A decree was passed in terms of the compromise but leave of the Court, under section 462 of the Civil Procedure Code of 1882, was not obtained

In 1906, the plaintiff, who was still a minor, sued to redeem the mortgage from defendant No 1 The defendant No 1 contended *inter alia* that the compromise decree was valid and binding on the plaintiff The Subordinate Judge found that the compromise in question was not entered into in fraud of plaintiff's rights, but his interests were not properly protected He, therefore, held that the compromise decree was not binding on the plaintiff, and on taking accounts found Rs 20 12 due to the defendant No 1 The plaintiff's share in the property, which was one half, was declared liable to pay Rs 10 6 to the defendant No 1 On appeal the Joint First Class Subordinate Judge, A P, reversed the decree and dismissed the plaintiff's suit, holding that the compromise decree was binding on the plaintiff inasmuch as his interest did not materially suffer by the decree The plaintiff appealed to the High Court

P V Nilsure for the appellant

Gadgil, with *N M Patuardhan*, for the respondent

The following cases were cited in arguments —*Manohar Lal* v *Jadu Nath Singh*[1] *Virupakshappa* v *Shidappa and Basappa*[2], *Ghulam Ali Shah* v *Shahabal Shah*[3]

CHANDAVARKAR, J —The lower appellate Court has held that leave of the Court was not obtained under section 462 of the old Civil Procedure Code (Act XIV of 1882) That being the case, according to the provisions of that section the compromise could not bind the minor and was voidable The Court under circumstances such as those in the present suit, where the minor comes forward to set aside the compromise, has no power to uphold it on the ground that it was for the benefit of the minor or that the minor had derived benefit from it The Legislature has said in so many words that a compromise entered into by the

(1) (1906) I L R 33 I A 1 8. (2) (1901) 26 Bom 109
(3) (1901) 1 1 No 3 of 1905 (Civ)

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parties to a suit, in which minors are interested, shall not bind the minor unless leave was obtained See the observations of the Privy Council in *Manohar Lal* v *Jadu Nath Singh*[1] and *Virupakshappa* v *Shidappa and Basappa*[2] The compromise must be set aside as not binding the plaintiff The lower appellate Court having disposed of the case on a preliminary point, we must reverse the decree and remand the appeal for a fresh hearing on the merits Costs of this appeal on the respondent Other costs to be costs in the appeal in the lower Court

Decree reversed Case remanded

R R

(1) (1906) L R 33 I A 128 (2) (1901) 26 Bom 109

APPELLATE CIVIL

Before Mr Justice Chandavarkar and Mr Justice Heaton

1911
March 21

GANPATSING HIMATSING (ORIGINAL JUDGMENT DEBTOR) APPELLANT v BAJIBHAI MAHMAD ASMAL (ORIGINAL DECREE HOLDER) RESPONDENT *

Gujarat Talukdars Act (Bombay Act VI of 1888) section 29E†—Talukdári Settlement Officer managing a Talukdar s estate—Creditor submitting his claim—Time taken up before the Talukdari Settlement Officer—Exclusion of time—Limitation Act (XV of 1877)

B obtained a decree for money against G a Tálukdar on the 22nd February 1903, and presented his first *darkhast* for execution on the 8th December 1903 On the 21st September 1905 G's estate came by notice to be in the manage

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* Second Appeal No 591 of 1910

† The section runs as follows —

29E (1) On the publication of a notice under section 29B, sub section (1) no proceeding in execution of any decree against the Tálukdar whose estate is taken under management or his property shall be instituted or continued until the decree holder files a certificate from the managing officer that the decree claim has been duly submitted or until the expiration of one month from the date of receipt by the managing officer of a written application for such certificate, accompanied by a certified copy of the decree.

Execution of decrees to be stayed till certificate filed

ment of the Talukdári Settlement Officer under section 29B of the Gujarát Talukdárs Act 1888 B submitted his claim to the officer on the 6th March 1905 but it was rejected on the 12th August 1908 B then applied to the Civil Court on the 12th March 1909 and sought to bring it within time by claiming to exclude the period taken up before the Talukdári Settlement Officer :—

Held that the period in question could not be excluded in computing the time for the *darkhást* for section 29E of the Act placed no absolute bar on B's right to apply to the Court for execution by reason of the submission of his claim to the Talukdari Settlement Officer

PROCEEDINGS in execution

The decree in question was a money decree obtained by one Bajibhai on the 22nd February 1903 against Gambhirsingji Hamirsingji, a Tálukdár Bajibhai first applied on the 8th December 1903 to execute the decree

On the 21st September 1905, the Tálukdari estate of Gambhirsingji passed into the management of the Tálukdári Settlement Officer, who published a notice under section 29B of the Gujarát Tálukdárs' Act, 1888, calling upon all persons having claims against the Tálukdár or his property, to submit the same in writing to him within six months of the notice

Bajibhai submitted his claim to the Talukdári Settlement Officer on the 7th March 1906, but it was rejected on the 12th August 1908

On the 12th March 1909, Bajibhai filed in the Civil Court the present *darkhast* to execute the decree, and sought to bring it within time by excluding the period of two years and five months taken by *the Tálukdári Settlement Officer in considering his* claim

(2) Any person holding a decree against such Talukdár or his property shall be entitled to receive from the managing officer free of cost, the certificate required by sub section (1)

(3) In computing the period of limitation prescribed by the Indian Limitation Act 1877 or by section 230 of the Code of Civil Procedure for any application for the execution of a decree proceedings in which have been stayed or temporarily barred by reason of the claim not having been duly submitted the time from the date of the notice published under section 29B sub-section (1) or of the decree if it was passed subsequently to the publication of the notice to the date of due submission shall be excluded.

1911

GANPATSING HIMATSING v. HAJIBHAI MAHMAD

The Subordinate Judge held that no exclusion could be allowed and rejected the *darkhast* as barred by time

On appeal the District Judge came to the conclusion that the period should be excluded in computing time and held that the *darkhást* was in time

Gambhirsingji appealed to the High Court

G S Rao, Government Pleader, for the appellant

G K Parekh, for the respondent

CHANDAVARKAR, J —The learned District Judge has gone beyond the plain language of section 29E of the Gujarát Tálukdárs Act in differing from the Subordinate Judge and holding that the present *darkhast* of the respondent for execution of his decree is not barred by limitation The facts are as follows The respondent obtained his decree for money against the appellant a Tálukdar on the 22nd of February 1903 and presented his first *darkhast* for execution on the 8th of December 1903 It is admitted that from the 21st of September 1905 the Talukdari estate of the appellant came by notice to be in the management of the Settlement Officer under section 29B of the Act, and, as required by the provisions of that section, the respondent submitted his claim under the decree in dispute for the consideration of the Officer on the 7th of March 1906 The respondent could not after that proceed with the execution of his decree through the Court without complying with the provisions of section 29E Under that section he had to do one of two things before he could ask the Court to execute his decree He had either to produce a certificate from the Officer that the claim had been duly submitted or to apply in writing to the Officer for such certificate accompanied by a certified copy of the decree and wait for the expiry of one month from the date of receipt by the Officer of the application If the Officer gave no certificate within that month, the respondent's right to apply to the Court for execution revived

There was, therefore, no absolute bar placed upon the right of the respondent to apply to the Court for execution by reason of the submission of his claim to the Settlement Officer

The District Judge thinks that the respondent is entitled to deduct the whole of the time from the date of the submission to the Officer to the date on which the claim was considered and rejected by the latter, because submission, in the learned Judge's opinion, means "an attempt to explain and press the claim or an effort to settle it," which in the present case was made, says the learned Judge, when the Officer rejected the respondent's claim on the 12th of August 1903 He relies in support of that view on a dictum in the judgment of the learned Chief Justice of this Court in *Purushottam* v *Rajbai*[1] That dictum bears no such meaning as the District Judge attributes to it

The decree must, therefore, be reversed and the *darkhast* disallowed with costs throughout on the respondent

Decree reversed

R R

(1) (1909) 34 Bom 142

PRIVY COUNCIL

MADAPPA HEGDE AND OTHERS (PLAINTIFFS) v RAMKRISHNA NARAYAN BHATTA AND OTHERS (DEFENDANTS)

P C 191 June

[On appeal from the High Court of Judicature at Bombay]

Mortgage—Construction of mortgage—Mortgage with interest partly in land and partly in cash—Interest when payable—Suit for arrears of interest—Words amounting to covenant to pay year by year

In this case their Lordships of the Judicial Committee held (reversing the decision of the High Court) that on the true construction of the mortgage there was clearly a personal covenant to pay interest on the mortgage-money from year to year and that the suit, which was for arrears of interest was therefore maintainable

APPEAL from a judgment and decree (22nd January 1908) of the High Court at Bombay, which reversed a decree (23rd December 1905) of the Subordinate Judge of Karwar

* *Present* :—Lord Macnaghten, Lord Shaw, Lord Mersey and Mr Ameer Ali.

1911

GANPATSING HIMATSING v BAJIBHAI MAHMAD

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1911

CANPATSING HIMATSING v BAJIBHAI MAHMAD

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R R

(1) (1909) 34 Bom 142

PRIVY COUNCIL

MADAPPA HEGDE AND OTHERS (PLAINTIFFS) v RAMKRISHNA NARAYAN BHATTA AND OTHERS (DEFENDANTS)

P C* 1911 June 17

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* *Present*:—Lord Macnaghten Lord Shaw, Lord Mersey and Mr Ameer Ali.

1911

MADAPPA HEGDE v RAMKRISHNA NARAYAN

The question for determination in this appeal was whether on the construction of a mortgage-deed, dated 21st July 1893, executed by the respondents in favour of the father of the appellants, the suit was or was not maintainable The Courts in India differed in the construction of the deed, the Subordinate Judge substantially decreeing the appellants' claim and the High Court dismissing the suit

The plaint stated that Ramkrishna Narayan Bhatta, the first defendant, for himself and also as manager of the joint family of which he was a member executed the mortgage deed in suit to secure the payment of Rs 30,000 mentioned in the mortgage as due by him and for interest on that sum The mortgagor stipulated, among other things, that he would pay a sum of Rs 200 in cash, and give bunches of betelnuts and other articles on 21st July 1894, that subsequently he would on 21st May in every year, or within two months after that fixed date, pay Rs 1,200 in cash in respect of the interest accruing for the year on the said money, at the rate of 4 per cent per annum, and also give the articles mentioned above, that in default of so paying he would personally pay the interest in arrears together with compound interest on the same at the rate of 4 per cent per annum, and that he would repay the principal amount within 40 years

The material portions of the mortgage deed according to a translation from the Kanarese original instrument made by Pandurang T Koppikar (specially authorised translator) for the purpose of this appeal were as follows —

I have passed this document in writing mortgaging the properties to be mentioned below for the total (of all the above named sums namely) Rs 30 000 thirty thousand and for the interest (thereon) to be paid in the manner described below and making myself liable to pay the said sum on the responsibility of these properties and in case they should prove insufficient (to realise the above sum) to pay (the deficit) personally Until I pay you Rs 30 000 (in words) thirty thousand under this agreement I shall pay interest in the following manner —The interest on this principal amount from this day forth up to the same date next year *i e* for one year is settled to be Rs 200 (in words) two hundred in cash and five loads of plaited coconut branches worth ten annas ten bamboos of the kind called Shami Bidru worth five annas, 50 fifty bundles of betel leaves worth eight annas, 12 twelve

bunches of ripe betelnut worth two rupees 30 thirty jack fruits worth one rupee five bunches of betel tree flowers worth five annas and also hundred bundles of dried leaves Of these the cash money and jack fruits I shall give on the 21st day of the month of May in the ensuing year 1894 A D and the bundles of betel leaves and bunches of betelnuts and also bunches of betel tree flowers on the 30th of the dark half of Kartik next and the bundles of cocoanut branches and Shami bamboos and also dried leaves on the 30th of the dark half of Magh next And thereafter from the beginning of the second year, each year cash interest at the rate of 4 per cent per year amounting to Rs 1 200 twelve hundred five loads of cocoanut branches ten bamboos fifty bundles of betel leaves twelve bunches of betelnuts thirty jack fruits, five bunches of betel tree flowers, and also hundred bundles of dried leaves —so much interest for each year as mentioned above I shall pay you that year also on the dates mentioned above and go on taking (a) receipt (*Ishtu i mérégé baddiannu ugaya varushadalli melkanda vaidegalante saha nanu nimage kottu rashidi tegedu collutta baruttene*)* And (of the items) of this interest jack fruits and dried leaves I shall deliver in the village of Navilgon and all the remaining items I shall deliver over at your house in the village of Karki from time to time And I shall pay you the principal amount Rs 30 000 (in words) thirty thousand within 40 forty years from this date in one sum together with the interest that might remain in arrears and take back this agreement with receipt (of the above) endorsed thereon together with the documents placed herewith If I should fail to pay the principal (sum of) money within the period stated above, I shall pay forthwith on your demand the principal and interest including interest at the same rate for the subsequent period up to the date of payment But until then if out of the interest due for each year the money payable in cash should not be paid within the date mentioned above and the interest so omitted to be paid in time should remain unpaid by me even within two months after that date I shall thereafter pay compound interest at the rate of 4 per cent per annum on the said sum of interest And although a period of 40 years is mentioned as the time within which the principal sum is to be paid off if perchance before the expiry of the said period it be convenient to me to pay

* This is a transliteration of the sentence in the original The actual expression used in the original is badh kottu which standing by itself may be literally translated as ' having paid interest The word kottu being a perfect participle According to the grammar and idiom of the Kanarese language however when there are more principal verbs than one in a sentence they are not joined together by the conjunction and as in English but all the verbs except the last one are converted into conjunctive or perfect participles and the last verb indicates the tense person etc of the verbs (*Vide* rule 29 of Thomas Hodson's Kanarese Grammar 2nd edition page 98 and rules 287 and 289 of A S Mudbhatkal's Kanarese Grammar, 1st edition p 184)

P T K

1911

MADAPPA HEGDE v. RAMKRISHNA NARAYAN

and I offer to pay a sum not less than 1,000 one thousand rupees as part of the principal within two months after paying the cash interest due every year or by the 21st of July every year you should receive the same without pleading the excuse of the said 40 years period and pass to me a receipt duly registered And immediately after the whole principal sum of Rs 30,000 thirty thousand is accordingly paid in full this deed is to be returned (to me) with an endorsement of payment In that case when as above sums are paid in payment of the principal interest on the remaining principal and the other articles (in respect of interest) are to be paid as mentioned above As to the interest in cash, however you are to receive the same at the rate of 4 per cent. per annum on the principal sums in balance (after each part payment) until the whole of the principal is paid off '

The plaintiffs stated that since the execution of the deed the defendant had paid in respect of interest only Rs 1,035 consisting of cash and articles according to the agreement, and the defendant had not paid the interest due to date since 21st May 1898 The plaintiffs therefore brought the present suit on 18th July 1904 and prayed for a decree awarding them " (a) Rs 7,200 cash interest for the six years from 21st July 1898 to 21st July 1903 at the rate of Rs 1,200 in cash per year in respect of the abovementioned hypothecation deed, and (b) Rs 1,005 9 6 compound interest to date on the amount of interest due for the said six years according to the terms of the agreement" The total amount claimed was Rs 8,205 9 6

Written statements were filed by the defendants, and issues were settled on the pleadings, the only issue now material being No 11—" whether the suit is maintainable under the terms of the mortgage bond in suit ?"

On that issue the Subordinate Judge said "I entertain no doubt that the suit is maintainable under the clear terms of the mortgage-bond (Exhibit 41) sued upon" and decreed the plaintiffs' claim

An appeal from that decision to the High Court came before N G Chandavarkar and R Knight JJ, whose judgment was in the following terms —

'The first question in this appeal is whether the suit lies The point urged by the learned Counsel for the defendant is that upon a proper construction of the mortgage deed there is no personal covenant on the part of the mortgagor to pay interest from year to year and that therefore he is not entitled to bring

this suit The Subordinate Judge has held against the defendant and passed a decree in favour of the plaintiffs The mortgage-deed has been read out before us and having carefully considered the contents of it, we are of opinion that Mr Robertson's contention must prevail The terms of the deed are free from ambiguity It starts by saying that the property covered by the mortgage deed is hypothecated for the sum of Rs 30,000 and interest and that that sum shall be payable out of it, the said property That is the dominant clause in the deed and, according to it there is no personal obligation to pay interest annually

"Then the deed goes on to provide for the manner in which interest shall be paid As regards that the provision in the deed is as follows —'We shall' says the executant, 'take receipts from you on payment of interest from year to year in the manner provided above There again there is no covenant. It only means if interest is paid from year to year, receipts shall be taken And a covenant should not be implied unless the language of the document is quite clear See *James* v *Cochrane*[1], where Parke B says —'According to the rule of law on this subject—and the whole case turns upon the application of that rule—no precise words are necessary to constitute a covenant provided we are able to collect an agreement by the parties that a certain thing shall be done, that will be sufficient to enable us to say that a covenant is created But we must be satisfied that the language does not merely show that the parties contemplated that the thing might be done but it must amount to a binding agreement upon them that the thing shall be done. In the mortgage deed before us there is no agreement by the mortgagors that they shall pay interest annually All they say is that if they pay they shall take receipts for the payment—which is a different thing from a personal covenant

"Then there is another passage in the document which supports the construction which Mr Robertson has asked us to put upon the document There the mortgagors say that should the property hypothecated prove insufficient to realise the amount of the principal and interest the mortgagors shall be personally liable for the deficit of the amount which may have to be realised That shows that the question of personal liability was present to the minds of the parties, and that whenever they intended that a personal liability should be imposed they used express and apt words to bring out their meaning These words have not been used with reference to the clause as to the annual payment of interest It is unnecessary to pursue other clauses because they all go to support our conclusion"

The High Court, therefore, reversed the decision of the Subordinate Judge and dismissed the suit

On this appeal which was heard *ex parte*,

De Gruyther K C and *Ross* for the appellants contended that the High Court had misconstrued the mortgage-deed of 21st

(1) (1852) 7 Exch. 171 at p. 177

1911.

MADAPPA HEGDE v. RAMKRISHNA NARAYAN

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(1) (1852) 7 Exch. 171 at p. 1—

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MADAPPA HEGDE v RAMKRISHNA NARAYAN

July 1893 and had wrongly held that the suit was not maintainable There was, it was submitted, an express personal agreement by the defendants to pay interest every year, and this was never denied by the defendants, who had merely contended that the personal liability could not be enforced under the mortgage-bond until the sale proceeds of the mortgaged property fell short of the amount due, and that the suit for interest on the personal covenant was premature The provision for payment of compound interest showed that the interest became due and was payable every year, and the other portions of the mortgage-deed did not support the construction arrived at by the High Court If it was considered that there was no express agreement to pay interest every year, such an agreement could at least have been implied from the terms of the deed The High Court had overlooked the fact that the interest was payable partly in cash and partly in kind, and that there was nothing in the mortgage deed to show that part of the interest (namely, that payable in kind) was to be paid every year, and payment of the rest of the interest (namely, the cash) was to be postponed for 40 years, as the High Court had held The mortgage deed, one made according to the practice prevailing in the mofussil and not by a professional lawyer, should have been construed not with reference to English decisions but in accordance with the real intentions of the parties as evidenced by the terms of the deed

1911 JUNE 13TH —The judgment of their Lordships was delivered by

LORD MACNAGHTEN —Their Lordships are of opinion that the judgment of the High Court is erroneous The learned Judges must have been misled by some erroneous translation, because on a certified translation before their Lordships nothing can be clearer than that there is a covenant to pay interest from year to year

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed and the order on appeal reversed and that the case should go back to the High Court so that the other issues may be dealt with

As regards costs the appellants are entitled to them here and in the High Court The costs in the lower Court will abide the event of the further hearing in the High Court

Solicitors for the appellants Messrs *T L Wilson and Co*

1911

MADAPPA HEGDE v. RAMKRISHNA NARAYAN

Appeal allowed.

J A W

ORIGINAL CIVIL

Before Sir Basil Scott Kt Chief Justice and Mr Justice Batchelor

SIDICK HAJI HOOSEIN, APPELLANT AND DEFENDANT v. BRULL AND CO RESPONDENTS AND PLAINTIFFS *

1910
September 2

Landlord and tenant—Sub lessee—Avoidance of lease—Vacant possession—Holding over—Transfer of Property Act (IV of 1882), section 108

The plaintiffs were lessees of a godown for one year from 1st April 1908, at a monthly rent From 1st May 1908 they sublet it on the same terms for the remainder of their lease to the defendant who used it for storing bags of sugar On 5th December the godown was partially destroyed by fire, and a quantity of sugar therein considerably damaged The defendant s insurers came in to take charge of the salvage but soon after sold the remains of the sugar to G M, and the latter then took possession and continued in possession, sorting the sugar until 16th February 1909 Meanwhile on 10th December the plaintiffs had written to the landlord advising him of the fire and of their termination of the lease in consequence The landlord however insisted on their liability to pay rent until such time as vacant possession should be given to him The defendant, in answer to a bill for rent wrote to the plaintiffs to the effect that he had terminated his lease on account of the fire and would not pay more than the proportionate rent for the first 5 days of December As however vacant possession was not given until 16th February (on which day G M went out of possession) the plaintiffs sued the defendant for rent and for use and occupation.

Held that the plaintiffs could not exercise their option to terminate the lease until they put the landlord into possession If the avoidance of the lease only

* Appeal No 10 of 1910 Suit No 257 of 1909

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section 108 (e) of the Transfer of Property Act (IV of 1882)(1) was effectual without surrender of vacant possession the plaintiffs by failing to give vacant possesion were holding over after the termination of their lease and were liable for rent under an implied monthly tenancy on the same terms as before If the avoidance was ineffectual, the lease continued until put an end to by mutual consent

Held, further that the abandonment to the insurers by the defendant was effected for his benefit, and in the absence of evidence that the insurers and their vendee G M kept the sugar in the godown in spite of protests by the defendant, the latter (as between the plaintiffs and the defendant) must be taken to have been in occupation either under his original tenancy or under a similar one resulting from his holding over

THIS was a suit filed by the plaintiffs to recover from the defendant a sum alleged to be due either as rent or as compensation for use and occupation of a certain godown in Clive Road for the months of December 1908, and January and February 1909 The godown in question was leased to the plaintiffs by one Lakhamsey Napu for 12 months from 1st April 1908 at a monthly rent of Rs 1,100, and sublet by the plaintiffs to the defendant at the same rent from 1st May 1908 for the remaining period of their lease The defendant used the godown for the storage of bags of sugar, and paid the rent regularly up to 30th November 1908 On 5th December 1909, however a fire broke out and the godown was badly damaged, the roof being entirely destroyed and several doors and windows partly burnt Immediately after the fire the salvage corps of the Insurance Companies, with whom the defendant had insured his sugar, took possession of the godown and the goods in it After 3 or 4 days however, they sold the sugar to one Gulam Mahamad Azam, who at once went into possession and began to sort the sugar and to put it into new bags

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(1) Section 108 (e) of the Transfer of Property Act runs as follows —

108 (e) If by fire, tempest or flood or violence of an army or of a mob or other irresistable force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall at the option of the lessee be void

Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision

On 10th December the plaintiffs wrote to Lakhamsey Napu —

"We herewith beg to hand you our cheque for Rs 1 100 in payment of the November rent of the godown in Clive Road leased by us from you

As the godown has now been burnt, please note that our agreement ceases until such time as it shall have been thoroughly repaired and made fit for the storage of goods

Lakhamsey replied on 11th December, the material portion of his letter being —

"In reply to the second para of your letter under reply, I beg to say that you will have to pay the rent of the godown as sugar bags and other *kutchra* are still lying therein and until the godown is cleared and possession given of it to me, please note that you are responsible for it You will please advise your sub tenant to remove sugar bags and other *kutchra*

The plaintiffs, being unable to give vacant possession to Lakhamsey, in fact paid rent to him for the month of December

The defendant, in response to a bill from the plaintiffs for the rent for December, wrote the following letter to them on 9th January 1909 —

"With reference to the rent bill for the month of December last in respect of the godown in Clive Road sent to me you are aware that the godown in question having been destroyed by fire on the evening of the 5th December I exercised my option to terminate the tenancy and the same is at an end I am not therefore liable to pay rent for the month, beyond the 5 days that the godown was fit for use and I am ready and willing and hereby offer to pay you proportionate rent for the said 5 days The same will be paid on your sending an amended bill

In answer to this the plaintiffs wrote (*inter alia*) —

"We beg to inform you that we find the godown is full of your salvage and therefore it is still in your occupation We must insist upon your paying us the rent in full and return you our bill herein enclosed.

Vacant possession was not given to Lakhamsey Napu till 16th February 1909

The suit was filed on 23rd March 1909, and came on for hearing before Davar, J, who passed a decree in favour of the plaintiffs for rent from 1st to 5th December 1908, and for compensation for use and occupation thereafter till 16th February 1909

The defendant appealed

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Weldon, with *Jinnah*, for the appellant :—Relationship is implied in a suit for use and occupation. If there was no relationship between the parties, the suit must fail, for damages have not been claimed. There was in fact no relationship after the respondents' notice to Lakhamsey on 10th December. After that notice, if a right existed in anyone to claim against the appellant, it must have been in Lakhamsey alone. More probably the only right existing was that of Lakhamsey to sue the purchaser of the sugar as a trespasser. It is noteworthy that the word used in section 108 (*e*) of the Transfer of Property Act is 'void.' The lease does not merely determine: it is void. With regard to the sufficiency of notice given by the appellant, see *Kunhayen Haji* v. *Mayan*[1] and *Baliaramgiri* v. *Vasudev*[2].

Setalwad, with him *Jardine* Acting Advocate General, for the respondents :—The lease by Lakhamsey to the respondents was not in fact terminated by the letter of 10th December. The correspondence and the facts show that clearly. The letter itself is not such an avoidance of the lease as is contemplated by section 108 (*e*) of the Transfer of Property Act. The respondents paid the rent for December, and Lakhamsey accepted it. Finally, they did not give him vacant possession. They were obviously still his lessees. Further, the appellant's notice of avoidance was not given within reasonable time. He had continued in possession as if nothing had happened. In any case the notice could not make the lease void '*ab initio*', but at the most only from the date of the notice: *Dhuramsey* v. *Ahmedbhai*[3]. But even after that date, he failed to give vacant possession, and thus continued liable.

Weldon, in reply :—The letter from the respondents' solicitor to Lakhamsey on 20th January states clearly that they are exercising their option. The rent for December may possibly have been paid under a misapprehension as to their rights. The appellant was not using the godown. He had no concern with the purchaser of the sugar. In *Dhuramsey* v. *Ahmedbhai*[3] there was no question of sub-tenancy.

(1) (1893) 17 Mad. 98. (2) (1896) 22 Bom. 313.
(3) (1898) 23 Bom. 15 at p. 19.

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SCOTT, C J —The plaintiffs rented from one Lakhamsey Napu a godown in Clive Road from the 1st April 1908 to the 31st March 1909 at a rent of Rs 1,100 per mensem with liberty to sublet it or relet it and the landlord agreed to keep the godown in good order and repair

On the 17th April 1908 the plaintiffs relet the godown to the defendant for the remainder of their term, *i e*, from the 1st May 1908 to the 31st March 1909 at the same rent and agreed to execute every kind of repairs

The defendant occupied the godown and used it for the storage of bags of sugar On the 5th December 1908 the godown was much damaged by fire, the roof and some doors and windows and the plastering of the walls being destroyed On the 10th of December 1908 the plaintiffs sent to Lakhamsey a cheque for the November rent and wrote that as the godown had now been burnt their agreement ceased until it should have been thoroughly repaired and made fit for the storage of goods

Lakhamsey replied on the 11th December that plaintiffs would have to pay the rent of the godown as sugar bags and other *kutcha* were still lying therein and that until the godown was cleared and possession given to Lakhamsey the plaintiffs were responsible for it

These letters are consistent with complete ignorance on the part of the writers of the provisions of section 108 (*e*) of the Transfer of Property Act under which the plaintifis had the option of electing to treat the lease as void The letter of the 10th of December rather indicates that the plaintiffs wished to have the godown repaired by Lakhamsey for their benefit and that rent should be suspended during the repairs

At any rate owing to the conduct of the defendant and his assignees in not vacating the godown the plaintiffs were unable to let Lakhamsey into possession and accordingly paid rent for the month of December

On the 16th January 1909 Lakhamsey recommenced the correspondence by threatening to charge Rs 2,000 from the 1st February if the possession was not given on the 31st January in consequence of the plaintiffs holding over.

The plaintiffs then resorted to solicitors and on the 20th January wrote that the godown having been destroyed by fire, on the 5th of December 1908, they exercised their option to terminate the lease and denied liability for rent after the 1st of January.

On the same date the landlord Lakhamsey replied that the plaintiffs could not exercise their option to terminate the lease until they put him into possession of the godown. To this position Lakhamsey adhered, and in this position the plaintiffs appear to have acquiesced until Lakhamsey was, owing to the removal of the sugar stored by the defendant, able to take possession of the godown.

The position taken up by Lakhamsey was, in our judgment, perfectly correct, and was in accordance with the provisions of section 108 (*m*) of the Transfer of Property Act. If the avoidance of the lease under section 108 (*e*) was effectual without surrender of vacant possession, the plaintiffs by failing to give vacant possession were holding over after the termination of their lease and were liable for rent under an implied monthly tenancy on the same terms as before. If the avoidance was ineffectual the lease continued until put an end to by mutual consent.

The defendant's position from the time of the fire was that he abandoned his sugar to his insurers who sold it to Gulam Mahamad Azam. The defendant did not make any arrangement to empty the godown on abandoning to the insurers but says he gave notice to the plaintiffs immediately the fire took place that he avoided his lease. This story was, we think rightly, disbelieved by the learned Judge. Gulam Mahamad, the purchaser of the sugar, utilized the godown as a place in which to put the sugar into different bags. Until this was done the sugar was not removed. The godown was vacated finally on or about the 16th of February.

The defendant on the 9th of January 1909 gave written notice to the plaintiffs that he had exercised his option to terminate the tenancy. The plaintiffs replied that as the godown was full of his salvage it was in his occupation and he was therefore liable for rent.

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In our judgment this contention was correct The abandonment to the insurers by the defendant was effected for his benefit and, in the absence of evidence that the insurers and their vendee Gulam Mahamad kept the sugar in the godown in spite of protests by the defendant, we think that as between the plaintiffs and defendant, the latter must be taken to have been in occupation, either under his original tenancy or under a similar one resulting from his holding over

In our judgment the respective tenancies of the plaintiffs and the defendant terminated upon Lakhamsey entering into possession on the 16th of February by the consent of all parties interested The defendant is, therefore, liable for the rent to plaintiffs up to that date

We accordingly affirm the decree of the lower Court and dismiss the appeal with costs

Attorneys for the appellant Messrs *Thakurdas and Co*

Attorneys for the respondents Messrs *Pestonji, Rustomji and Colah*

Decree affirmed

K McI K

ORIGINAL CIVIL

Before Mr Justice Robertson

BHAISHANKER AMBASHANKER, PLAINTIFF *v* MULJI ASHARAM AND OTHERS, DEFENDANTS *

1910 *September* 10

Practice—Security for costs—Infant plaintiff—Civil Procedure Code (Act V of 1908), Schedule I Order XXV rule 1

It is not desirable to run any risk of stopping a suit filed on behalf of an infant which may be a proper suit to bring merely because of some inability on the part of the next friend to give security for costs

PROCEEDINGS in Chambers

The plaintiff was a minor, and sued by his next friend (*inter alia*) for an injunction restraining the defendants from per-

* Suit No. 401 of 1910

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BHAI SHANKER AMBA SHANKER v. MOLJI ASHARAM

forming the marriage of one Bai Mani to the fourth defendant, and for a declaration that the said Bai Mani was lawfully betrothed to the plaintiff himself The first defendant took out this summons calling upon the plaintiff's next friend to show cause why he should not give security for costs The summons was argued before Mr Justice Robertson

Desai appeared for the plaintiff to show cause

Setalvad appeared for the defendants in support of the summons

ROBERTSON, J :—This is a summons whereby the next friend of the plaintiff is called upon to show cause why he should not be made to deposit in Court such sum as the Honourable Judge may deem sufficient as security for the first defendant's costs of this suit

It appears that the next friend and the plaintiff are both residents outside the jurisdiction of the Court and do not own immoveable property in British India, and under those circumstances, it is urged, the next friend ought to be directed to give security for costs

The decision in Bombay, which has the most bearing upon this point, is the case of *Bai Porebai v Devji Meghji*[1] It appears from that case that it was laid down that except in exceptional cases neither an infant female plaintiff nor her next friend ought to be required to give security for costs In his judgment Sir Charles Farran says at page 102 "If, then, the next friend of an infant plaintiff and not the infant plaintiff himself or herself is and has always been liable for the costs of the suit, a provision that a woman shall not be imprisoned for debt gives rise to no inference that the Legislature intended in any way to change the practice as to a female infant plaintiff giving security for costs We think, therefore, that except in exceptional cases, the old practice ought still to be observed The Advocate General urges that this ruling will permit of improper suits being filed as next friends of female infant plaintiffs The same argument, if of weight, applies with equal cogency to the

(1) (1898) 23 Bom. 100

next friends of male infant plaintiffs The answer to this appears to us to be that the Courts can be moved to stay a suit improperly brought on behalf of an infant and to remove an improper next friend of an infant and to substitute a proper person in his place"

The English practice is laid down in the case of *Hind* v *Whitmore*[1] referred to by Sir Charles Farran in the case of *Bai Porebai* v *Devji Meghji*[2] That case was of a married woman, where she was actually suing in *formâ pauperis*, and also deals with the case where she sues by a next friend Vice Chancellor Sir W Page Wood says at pages 461 and 462

' The circumstances which make a difference between the case of a feme coverte and an infant are not only that a feme coverte selects her own next friend but also that this Court is always anxious that cases in which infants are concerned should be brought to its notice, and it has a jurisdiction over suits by infants, which it has not in the case of suits by married women, to stay such suits if not for the infant's benefit and can for that purpose avail itself of any impropriety on the part of the next friend in bringing the suit But it is not so in the case of a married woman Her suit must go on however impossible it may be for the defendant to have any remedy for costs, in case they should be ordered to be paid to him

Cases will be found collected in the Annual Practice for 1909, Vol I, page 183, where it is said with regard to next friends 'Security for costs He (the next friend) is not obliged to give security for costs, although he may be impecunious and a stranger but if he appeals and is insolvent he may have to give security "

The practice therefore seems to be that in the case of an infant it is not desirable to run any risk of stopping the suit filed on behalf of an infant, which may be a proper suit to bring, merely because of some inability on the part of the next friend to give security for costs, and the Courts have apparently considered that the interests of other parties to the suit are sufficiently protected by the power they have in a proper case of moving the Court either to stay the suit as not being for the benefit of the infant, or, if there is a just cause other than the poverty of the next friend, to have him removed

(1) (1856) 2 Kay & J 458 (2) (1898) 21 Bom. 100

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Therefore, it seems to me that I should be departing from the principles and practice both of this Court and of Courts in England, if I were to make any order directing security to be given in this case

Summons will, therefore, be discharged

Costs costs in the cause

Attorneys for the plaintiff Messrs *Khunderao, Laud and Mehta*

Attorneys for the defendants Messrs *Hiralal and Co*

K McI K

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt, Chief Justice, and Mr Justice Robertson

1910 September 22

MANJI KARIMBHAI APPELLANT AND SECOND DEFENDANT, v HOORBAI, RESPONDENT AND PLAINTIFF *

Civil Procedure Code (Act XIV of 1882) section 317, (Act V of 1908), section 66—Court sale in execution—Certified purchaser—Benami—Mortgage of certified purchaser—Protection—Doctrine of constructive notice—Transfer of Property Act (IV of 1882), sections 3 and 41

The mortgagee of the certified purchaser at a Court sale is entitled to rely upon the title of his mortgagor including such immunity from suit as the law *provides in support of the statutory title* Section 66 of the Civil Procedure Code (Act V of 1908)—which may be called in aid for the purpose of assisting in the construction of section 317 of the Civil Procedure Code (Act XIV of 1882)—supports this conclusion

Hari Govind v *Ramchandra*(1), followed.

The doctrine of constructive notice applies in two cases first, where the party charged had actual notice that the property in dispute was charged incumbered or in some way affected, in which case he is deemed to have notice of the facts and instruments to a knowledge of which he would have been led by an inquiry after the charge or incumbrance of which he actually knew, and secondly, where the Court has been satisfied from the evidence before it that the party charged had *designedly abstained from inquiring for the very purpose of* avoiding notice

* Appeal No 21 of 1910 Suit No 667 of 190 .

(1) (1906) 31 Bom 61

This does not conflict in any way with the statutory definition of notice in section 3 of the Transfer of Property Act (IV of 1882)

A purchaser of property is under no legal obligation to investigate his vendor's title But in dealing with real property as in other matters of business regard is had to the usual course of business and a purchaser who wilfully departs from it in order to avoid acquiring a knowledge of his vendor's title is not allowed to derive any advantage from his wilful ignorance of defects which would have come to his knowledge if he had transacted his business in the ordinary way This is what is meant by reasonable care in section 41 of the Transfer of Property Act (IV of 1882)

Occupation of property which has not come to the knowledge of the party charged is not constructive notice of any interest in the property

THIS suit was filed by the plaintiff Hoorbai, praying (*inter alia*) for a declaration that she was absolutely entitled to a certain house purchased at a Court sale by the first defendant,—who, the plaintiff alleged was a *benami* purchaser for her—and mortgaged by him to the second defendant

Beaman, J, before whom the suit came up for trial, decided in the plaintiff's favour The second defendant appealed

The facts of the case and the arguments are fully set out in the judgment of the Appeal Court

Desai, with *Kanga*, appeared for the appellant

Bahadurji, with *Jinnah*, appeared for the respondent

SCOTT, C J —The plaintiff alleged that she was one of the beneficiaries under a trust deed whereby her mother Fatmabai, widow of Haji Tar Mahomed Sajan, settled upon her son and daughter *inter alia* a house in Kumbekar Street

That in suit No 64 of 1899, to which the plaintiff and the heir of her sister Jumbabai were parties it was by a consent decree declared that the plaintiff and Jumbabai or her children were to take the trust premises in equal shares

That upon applications for execution made by some of the parties to the suit a warrant for sale of the right, title and interest of Fatmabai in the house was issued on the 15th of July 1901 and that at the suggestion of the defendant 1, who was her confidential adviser, the plaintiff supplied him with funds wherewith he purchased the house at a Court sale held

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under the said warrant on the 18th of October 1901 for Rs 9300 That she advanced divers sums of money to the first defendant for payment of workmen and the purchase of material in connection with the repairs to the house but that the first defendant had not accounted for such advances That the first defendant set up falsely a mortgage of the house to the second defendant with her approval and she claimed that any such transaction was void and that the second defendant must be taken to have had notice of her interest in the house in view of her having been throughout in possession thereof

She prayed for a declaration that she was absolutely entitled to the house free of all incumbrances and for transfer of the same to her and delivery of documents of title

The first defendant in his written statement stated that he agreed to buy the house for the plaintiff in his name and undertook to supervise the work of putting the same in thorough repair if the plaintiff would give him a half share in the net profits on resale after payment to her of all the moneys expended in purchase and repair of the properties with interest at 9 per cent per annum, and that the plaintiff accepted his proposals and paid to him Rs 9,600 for the purchase of the property of which the unused balance of Rs 300 together with other advances made by the plaintiff aggregating Rs 1,400 were spent in repairs, that a more moneys were required to put up an additional story and carry out extensive alterations the defendant asked plaintiff to put him in funds but being unable to do so she requested him to raise the further sums required by mortgaging the property The defendant thereupon mortgaged the property to the second defendant and the title deeds (which consisted of the decree in suit No 61 of 1899 and the certificates of sale) which were handed over by the plaintiff when the property was mortgaged to the second defendant

The second defendant pleaded that he was a *bonâ fide* purchaser for value without notice

In view of the sweeping condemnation of the first defendant contained in the judgment of the lower Court in discussing one of the questions in issue in this appeal, it is desirable to set out

in detail the somewhat peculiar course which the trial of this suit has taken

It was called on for hearing on the 5th of March 1905 when by consent of all parties the hearing was adjourned and by consent of the plaintiff and the first defendant it was referred to a Special Commissioner to take (1) an account of the money dealings between the plaintiff and the first defendant in connection with the purchase and repairs of the premises mentioned in the plaint and (2) an account of the moneys expended by the first defendant for repairs and alterations made upon and to the plaintiff's premises mentioned in the plaint

On the 26th April 1906 during the pendency of the reference to the Commissioner the first defendant died and his widow Asibai was placed on the record in his place On the 15th of May 1907 the Special Commissioner made his report which was the subject of exceptions by the parties resulting in a remand to the Commissioner by the Court on the 19th August 1907

On the 5th of December the Commissioner made his report on the remand

This again was the subject of exceptions which resulted in a judgment by the Court on the 7th February 1908 wherein the conclusion was arrived at that Rs 11,200 had been received by the first defendant from the plaintiff and that Rs 3,800 in addition was proved to have been spent by him on the house, the Court held, however that it had not been proved that this further sum had been spent by the first defendant out of his own pocket and that the plaintiff had failed to prove that she had supplied it

An appeal from this judgment was dismissed on the 18th December 1908

On the 1?th of March 1910 the suit was heard as against the second defendant Asibai the widow of the first defendant had died and the plaintiff not having placed anyone else on the record to represent the first defendant the suit abated as against him and his estate

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The questions raised were—

(1) Whether the suit could be maintained against the second defendant having regard to the fact that it had abated against the first defendant ?

(2) Whether the suit was maintainable in view of the provisions of section 66 of the Civil Procedure Code of 1908 or the similar section 317 in the Code of 1882 ?

(3) Whether the second defendant was not a *bonâ fide* purchaser for value without notice to the extent of his advances and interest thereon ?

(4) Whether if the moneys advanced on mortgage by the second defendant had been spent in repairing the property the mortgage was not binding on the plaintiff's interest ?

The learned Judge in the lower Court decided all these questions against the second defendant and passed a decree declaring the plaintiff absolutely entitled to the house and ordering the second defendant to transfer it to the plaintiff's name and to hand over all documents of title relating to the house except his mortgage deed, the Court further declared that the first defendant was only a *benamidar* of the plaintiff

The first of these questions, which is based upon the abatement of the suit as against the first defendant, raises a point of difficulty which is not disposed of by reference to the decision in *Padgaya* v *Baji*[1], cited by the appellant, a decision the correctness of which has been challenged in the Madras High Court see *Muthu Vijia Raghunatha Ramachandra* v *Venkatachallam Chetti*[2] We think it unnecessary to decide the point for in our judgment this suit is not maintainable in view of the provisions of section 317 of the Civil Procedure Code of 1882 and the second defendant s plea of *bonâ fide* purchase for value without notice is also a good defence to the suit

As regards the technical defence we adopt the reasoning of the learned Judges in *Hari Govind* v *Ramchandra*[3] and we are unable to accept the view of the lower Court that a mort-

(1) (1895) 20 Bom 549 (2) (1896) 20 Mad 3..
(3) (1906) 31 Bom 61

gagee of the certified purchaser does not to the extent of his mortgage interest stand in his mortgagor's shoes The mortgagee is entitled to rely upon the title of his mortgagor including such immunity from suit as the law provides in support of the statutory title Section 66 of the Civil Procedure Code of 1908, which may be called in aid for the purpose of assisting in the construction of section 317 (see *Swift* v *Jewsbury*[1] and *Morgan* v *London General Omnibus Co*[2]) contains, we think, a legislative recognition of the correctness of the view taken in *Hari Govind* v *Ramchandra*[3] and supports the conclusion that a mortgagee claiming under a Court sale purchaser enjoys the same immunity from suit as his mortgagor In view however of the decision of the Judicial Committee in *Mussumat Buhuns Kowur* v *Lalla Buhooree Lall*[4] it is not clear what value would attach to the title created by the certified purchaser in a suit brought by his mortgagee against the purchaser's secret principal in possession And as the question of the binding nature of the second defendant's mortgage has been definitely raised and considered by the lower Court we think it desirable to decide the question in this appeal

In support of his plea that he is a purchaser for value without notice, the second defendant has disposed that when he made advances on the mortgage of the house in May 1902 he believed it to be the property of the first defendant and that he had no reason to believe that the plaintiff had anything to do with it He went to see the property before advancing the money and he saw that most of the house had been pulled down, the roof of the rear portion and the walls standing but the whole of the front being razed to the ground

It is, however alleged and it has been found by the learned Judge that he had constructive notice of the plaintiff's interest first because he failed to make any enquires as to the title to the property, and, secondly, because the plaintiff was in actual occupation

Now, the doctrine of constructive notice, as was shown by Wigram, V C, in the leading case of *Jones* v *Smith*[5], applies

(1) (1874) L. R. 9 Q. B. 301 at p. 311 (3) (1906) 31 Bom 61.
(2) (1883) 1° Q. B. D. 201 at pp. 205 207 (4) (1870) 14 Moo. I. A. 496
(5) (1841) 1 Hare 43.

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in two cases, first where the party charged had actual notice that the property in dispute was charged, incumbered or in some way affected, in which case he is deemed to have notice of the facts and instruments to a knowledge of which he would have been led by an inquiry after the charge or incumbrance of which he actually knew, and, secondly, cases in which the Court has been satisfied from the evidence before it that the party charged had designedly abstained from inquiring for the very purpose of avoiding notice This judgment is referred to with approval by the Judicial Committee in *Barnhart* v *Greenshields*[1] and is accepted by the authors of Dart's Vendors and Purchasers as correctly stating the effect of the authorities subject to certain qualifications not material in this case It does not appear to us to conflict in any way with the statutory definition of notice in section 3 of the Transfer of Property Act

In section 41 of that Act, which has been treated by the learned Judge as applicable to the case, the word 'notice' is not used, so the statutory definition of that term need not be further discussed We think that the following remarks of Lindley, L J, in *Bailey* v *Barnes*[2] indicate what is meant by 'reasonable care' in the section "A purchaser of property is under no legal obligation to investigate his vendor's title But in dealing with real property, as in other matters of business, regard is had to the usual course of business, and a purchaser who wilfully departs from it in order to avoid acquiring a knowledge of his vendor's title is not allowed to derive any advantage from his wilful ignorance of defects which would have come to his knowledge if he had transacted his business in the ordinary way"

The learned Judge apparently considered that the second defendant must be deemed to have notice of the plaintiff's interest by reason of the mere fact of her living in a room in that part of the house which was not pulled down at the date of the earlier mortgage to the second defendant in May 1907 quite irrespective of the question whether the second defendant had knowledge that she was living there An examination of the authorities, however, will not show that occupation which

(1) (1853) 9 Moo P C 18 at p 38 (2) [1894] 1 Ch 25 at p 35

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has not come to the knowledge of the party charged is constructive notice of any interest in the property, for example, in the cases of *Taylor* v *Stiles*(1) *Daniels* v *Davison*(2), *Allen* v *Anthony*(3), the knowledge of the party charged of the fact of tenancy or occupation was beyond dispute In the present case the evidence of the plaintiff and her witnesses does not bring home to the second defendant any knowledge of the plaintiff's occupation The plaintiff was strictly cross examined as to the question of her occupation and she admitted that before the Special Commissioner she might have said that she never resided in the house before it was purchased by her She said that she lived in the house while the repairs were going on moving from floor to floor Her witness, the Mistri engaged by the first defendant to execute the repairs, says that except a floor and a half the whole house was pulled down when he was engaged and that the whole building except a floor and a half was rebuilt, and that when the work began the plaintiff was living on the roof in a loft or garret The plaintiff says that although the house is now a seven storied house, there were no tenants during the repairs, that prior to the date of her purchase she had usually lived in the next house which she owned, and she admits that a side wall had been pulled down and that a chowk in the middle was constructed during the operations The Mistri says that the repairs were carried out under the supervision of the first defendant, but the plaintiff was continually on the premises "breaking her head at the workmen all the time"

It is not alleged that the second defendant was ever informed by anyone that the plaintiff was living on the premises and it cannot be assumed against his denial that his inspection of the house in its dilapidated condition disclosed to him the strange and changing occupation alleged by the plaintiff during the progress of the repairs

The learned Judge further appears to have been of the opinion that the second defendant wilfully abstained from inquiry into facts which would have disclosed the plaintiff's title and is

(1) (17[illegible]) [illegible] Ves. Jr 43[illegible]
(2) (1[illegible]) 16 [illegible]
(3) (1816) 1 Mer 2[illegible]

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therefore affected with constructive notice The evidence, however, does not support this conclusion It is not disputed that the *second defendant submitted the documents of title produced* by his vendor to his Solicitors for their opinion as to the title disclosed Those documents consisted of the consent decree in the suit relating to the interests of the beneficiaries under Fatmabai's trust deed and the certificate of sale granted by the Court to the first defendant upon his purchase in October 1901 The Solicitors pronounced the title of the house to be defective because in their opinion it was possible that other members of the family of Fatmabai, who were not parties to the consent decree, might be interested in the property and subsequently put in a claim to it, and because the title deeds of *the house prior to the date of the consent decree were not* forthcoming, but they never suggested that those claiming interests under Fatmabai were not bound by the consent decree and the certificate of sale The plaintiff was one of those persons so far as was disclosed by the documents produced by the vendor The action of second defendant in taking the mortgage after receiving the opinion of his Solicitors merely shows that he was willing to take the possible risk indicated and was prepared, as many persons in this country are prepared and as the Legislature apparently intended they should be, to accept the title disclosed by the certificate of sale In our opinion there was nothing in the investigation of title which led to a suspicion that the plaintiff was beneficially interested in the property nor does it appear that an examination of the bills presented by the Assessment Department of the Municipality would have disclosed anything beyond the fact that they were made out in the name of the plaintiff and her co trustee Sidick Jakeria as trustees under Fatmabai's trust deed at a date prior to the purchase by the first defendant

The learned Judge further says that noting the relations which existed for a time between the first defendant and the second defendant, the conduct of the second defendant in regard to this matter of doubtful title would seem to suggest that he and the first defendant had come to an understanding upon



the matter and that the first defendant had induced him to advance his money upon a pretty clear comprehension of what the truth of the matter was The learned Judge also states that he has very little doubt from the facts stated by the plaintiff in her evidence that the first defendant was a rogue who had deliberately planned to impose upon her and despoil her of all her property

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Now, having regard to the fact that the second defendant was advancing Rs 4,500 upon the mortgage of May 1902 at a not exorbitant rate of interest, it is difficult to see what he could hope to gain by paying this sum to a person whom he believed to have no interest in the property offered as security The plaintiff's counsel was unable to suggest any reason for disbelieving that the second defendant had advanced his money in good faith nor does the learned Judge indicate what in his opinion the second defendant was to gain by the transaction as it presented itself to the lower Court The fact that, owing to the second defendant being dissatisfied with the security of the house in its dilapidated condition, the first defendant added as security for the mortgage of May 1902 a small property of his own is quite consistent with his case that he was interested in the repairing of the plaintiff's house as she had agreed to give him a share of the ultimate sale proceeds If this case is not true it is difficult to see why the first defendant should have worked for the plaintiff without any immediate remuneration

Moreover we are unable to agree with the strictures passed by the learned Judge upon the first defendant It is to be observed that so far as definite conclusions were arrived at by the Court in the proceedings to which we have referred on the very voluminous evidence recorded by the Commissioner, the statements made by the first defendant in his written statement as to the moneys received by him from the plaintiff were almost entirely substantiated, and the result arrived at, notwithstanding the disadvantage that the Court was under owing to the death of the first defendant and not having his evidence to show what money had been spent upon the repairs and from whence it had been received, was that over and above the

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advances proved by the plaintiff to have been made to the first defendant a sum of not less than Rs 3 800 had been expended by him upon the property although the Court was not able to say that he had spent it out of his own pocket. This conclusion to say the least of it does not render it *prima facie* improbable that the money advanced by the second defendant was expended by the first defendant, as he alleged against his interest in his written statement upon the repairs of the house in question.

For these reasons, we are of opinion that the second defendant advanced his money upon the mortgage of the house in *good faith and without notice that the plaintiff had any interest* in it, and that his present mortgage of the 4th April 1903 is binding upon the property in the hands of the plaintiff, and we reverse the decree of the lower Court and dismiss the suit with costs throughout upon the plaintiff as between her and the *second defendant.*

Solicitors for the appellant: Messrs *Manchershah and Narmadashanker.*

Solicitors for the respondent: Messrs *Mehta and Dadachanji.*

Decree reversed.

R. McI. R.

ORDINARY ORIGINAL

Before Mr. Justice Robertson.

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November 11

AISHABIBI AND ANOTHER, PLAINTIFFS v. AHMED BIN ESSA AND OTHERS, DEFENDANTS.*

JASSEM BIN MAHOMED, PLAINTIFF, v. AHMED BIN ESSA AND OTHERS, DEFENDANTS.†

AHMED BIN ESSA, APPLICANT, v. MESSRS. THAKURDAS AND CO., RESPONDENTS.

Solicitor's lien for costs—Charge of Solicitors—Inspection of documents—Administration suit.

The right to be exercised by a Solicitor claiming a lien largely depends upon the circumstances under which he has ceased to act for his client, the test being, whether the Solicitor has discharged himself or has been discharged by the client.

* Suit No. 4[illegible]3 of 1907. † Suit No. 517 of 1908.

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indebted in a large sum to Messrs Thakurdas and Co for costs, for which the latter claimed a lien on the papers in their possession For some time, however, they allowed the new attorneys to take inspection, but, eventually, finding it impossible otherwise to secure their costs, withheld inspection

Ahmed therefore, took out a summons against Messrs Thakurdas and Co to show cause why they should not produce the above documents

Jinnah for the respondents showed cause —Section 171 of the Contract Act gives an absolute lien If this section does not apply, there is a lien in English law and such lien includes the right of withholding inspection *Re Biggs and Roche*[1] If the client has discharged the attorney, the latter has even the right to embarrass the client in pending litigation *Lord v Wormleighton*[2] Here the client discharged the attorneys The fact that the applicant gave the warrant while Messrs Thakurdas and Co were actually his attorneys on the record and the wording of the Court's order of discharge, making the payment of taxed costs a condition precedent, point to a discharge by the client not by the attorney The correspondence shows the same In any event no discharge by the attorney can be alleged save in Suit No 517 of 1908 Thus, at the most the only lien lost is that for costs of Suit No 517 of 1908 The respondents have still a lien on all the papers in all the suits for costs of Suits No 423 of 1907 and No 640 of 1908, and for costs of Shaikh Essa Further, the applicant has no right to inspection of Essa's papers, which came into the respondents' hands before the applicant was their client at all Essa's estate still owes costs

Bahadurji for the applicant —The applicant did not discharge the respondents they compelled him to change his attorneys Numerous cases show that a Solicitor who refuses to continue to act save on payment of his costs discharges himself *Heslop v Metcalfe*[3], *Robins v Goldingham*[4], *Wilson v Emmett*[5] *Atul Chunder Mookerjee v Soshi Bhushan Mullick*[6],

(1) (1897) 41 Sol J 277
(2) (1822) Jac 580
(3) (1837) 3 My & Cr 183
(4) (1872) L R 13 Eq 440
(5) (1854) 19 Beav 233
(6) (1901) 29 Cal 63

Basanta Kumar Mitter v *Kusum Kumar Mitter*[1] But even if the client has discharged the attorney, the latter cannot embarrass the conduct of suits in which parties other than his client are interested, *e g*, in administration proceedings See *Boughton* v *Boughton*[2] It makes no difference who is entitled to the conduct of the suit *Boden* v *Hensly*[3], *In re Hawkes*[4] The right of an attorney to refuse production altogether is confined to cases where he is arbitrarily discharged by the client without provision for costs, and the suit concerns the clients' interests alone See Cordery (3rd Ed) p 371

ROBERTSON, J —In this case the applicant Ahmed bin Essa Khalifa has taken out a summons in Suit No 423 of 1907 against the firm of Messrs Thakurdas and Co calling upon them to show cause why they should not forthwith give a full free and complete inspection of certain papers and documents relevant to that suit in the respondents' possession and why the applicant should not be allowed to take full and complete copies of the said documents He has taken out a similar summons against Messrs Thakurdas and Co in Suit No 517 of 1908

The applicant alleges that after the death of his father Essa bin Khalifa, Messrs Thakurdas and Co, who had been his father's Solicitors, continued to act as the Solicitors of himself and his two brothers in the litigation that was then pending between his father and one Fatmabibi, and they also acted as Solicitors of himself and his brothers in certain other actions, which were filed after the death of his father

Some time in November 1909 the applicant became on bad terms with his brother and nephew and it became impossible for Messrs Thakurdas and Co to continue to act for all the three

In Suit No 517 (which was originally filed by the applicant's brother Mahomed for the administration of the estate of Essa bin Khalifa) on the death of Mahomed his son Jassen was made plaintiff as his father's representative In Suit No 423 Jassen

(1) (1900) 4 C W N 767
(2) (1883) 23 Ch D 169
(3) [189] 1 Ch 101
(4) [1898] 2 Ch 1.

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was similarly substituted as a party in the place of his deceased father

The question that arises in the summons is whether in the circumstances that have happened *Messrs Thakurdas and Co* are entitled to refuse the inspection asked for on the ground that they are entitled to exercise their lien to its full extent even though such exercise should embarrass the applicant in the conduct and defence of these various suits The authorities appear to show that the right to be exercised by a Solicitor claiming a lien largely depends upon the circumstances under which he has ceased to act for his client The test suggested in the text books and authorities is whether or not the Solicitor has discharged himself or whether he has been discharged by the client, in other words the question is whether the Solicitor has ceased to act for his client owing to unjustifiable action of his own or whether he has so ceased owing to the action of the client

Both the parties have based their case on the result of the correspondence between them, and the letter by which the correspondence begins is that of the 16th November 1909 addressed by Messrs Thakurdas and Co to the applicant and his brother and nephew and headed as of the Suit No 517 of 1908 which runs as follows —

We have received instructions from you Mr Ahmed to proceed with the suit whereas you Mr Yusuff and Mr Jassen do not desire the suit to go on in the manner proposed by Mr Ahmed

These conflicting instructions are injurious to our cause and we are at a loss what to do

You Mr Ahmed must remember that the suit has been on the postponed list for a long time and may soon be placed on the prospective board

We must therefore arrange to get the suit postponed unless it is settled as there is hardly time for translations of documents and preparing materials for trial

We must also know definitely whether you Mr Ahmed wish to renew your application for commission

If you Mr Ahmed decide to go on with the suit, please note that you Mr Ahmed will alone have to pay us our costs of the suit and be liable for any costs decreed by the Court, as Mr Yusuff and Mr Jassen have given us notice

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that they will not be liable for the future costs of this suit, and that the arrangement to share costs and expenses has been put an end to

Under the circumstances you Mr Ahmed will please send us a letter agreeing to bear the costs of the suit from this date yourself

You Mr Yusuff and Mr Jassen will also please inform us precisely what you want us to do You cannot simply tell us that you do not desire to go on with the suit You must tell us what attitude you wish to adopt and arrange for your desires being carried out

Thus it would appear that the applicant was expressly asked to state whether he wished to proceed in Suit No 517 of 1908 and he was called upon to note that if he did desire Messrs Thakurdas and Co to continue to act for him in that suit he would be liable for any costs that might be incurred There is no demand for any payment on account of costs From the correspondence annexed to the affidavits, it appears that the applicant sent no reply to that letter, and the next letter annexed to the affidavits is again one from Messrs Thakurdas and Co to the applicant which is written by them on behalf of Messrs Yusuff and Jassen Again Messrs Thakurdas and Co point out to the applicant how extremely awkward their position had become and ask the applicant to arrange with Messrs Yusuff and Jassen that they should be represented by different Solicitors Again no reply seems to have been sent by the applicant to this letter, and accordingly on the 18th January, Messrs Thakurdas and Co write to the applicant to say that under the circumstances they propose to act for Messrs Jassen and Yusuff In considering whether this correspondence shows that Messrs Thakurdas and Co so far as that suit was concerned were discharged by the applicant it is necessary to bear in mind that the plaintiff in that suit originally was Mahomed, and that the applicant was a defendant who sided with the plaintiff but the attorneys Messrs Thakurdas and Co would necessarily be primarily Solicitors of the plaintiff who had committed to them the conduct of the suit on his behalf It appears to me under those circumstances that Messrs Thakurdas and Co had done all that they could possibly be expected to do under the circumstances in calling the applicant's attention in the first place to the fact that if he

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wished to continue the suit he would be from that date the party liable to pay Messrs Thakurdas and Co their costs, and in the second letter, to which I have referred of the 11th January asking the applicant to arrange with his brother and nephew, so that they could be represented by different Solicitors After the receipt of the letter of the 18th of January, the applicant wrote a letter through his Solicitors on the 20th January, in which he says that he notes what is stated in the letter of the 18th instant, namely, that it would be necessary for him to appear by other attorneys than those acting for Jassen and Yusuff, and asks what are the circumstances which require the parties to appear by different Solicitors and why Messrs Thakurdas and Co have elected to act for Jassen and Yusuff Having regard to the fact that this letter was written more than two months after the receipt by the applicant of Messrs Thakurdas and Co's letter of the 16th of November and to paragraph 8 of the applicant's affidavit filed on this summons, I cannot regard this letter as being altogether *bonâ fide*

The para runs —

8 From November 1909 certain disputes and differences arose between me on the one hand and Jassen and Yusuff the plaintiff and the second defendant on the other hand when Messrs Thakurdas and Co sided with the plaintiffs and the second defendant herein and declined to act any further for me this deponent in any of the said suits and matters and proceedings relating to estate of the said deceased Essa bin Khalifa and upon this I was compelled to change attorneys and to go to my present attorneys Messrs Ardeshir Hormusji Dinshaw and Co. Copy correspondence on the subject is hereto annexed and marked collectively with the letter A

He was expressly warned that it would be necessary either to agree to be liable for the costs of the suit if he wished Messrs Thakurdas and Co to continue to act for him or that he should himself appoint other Solicitors, and in my opinion he was not entitled to wait for two months before answering that letter and then to suggest that as a matter of fact Messrs Thakurdas and Co discharged themselves as his Solicitors

In subsequent correspondence a request was made by the applicant to be allowed to take inspection and Messrs Thakurdas and Co took up a very reasonable position

in that they offered to allow the applicant to take inspection in the meantime but requested him to make arrangements for the payment of their costs It is clear from the letters written during the month of February that the applicant did make from time to time certain promises with regard either to the payment of the costs or to the proposed arrangements securing their payment to Messrs Thakurdas and Co That inspection continued for at least 22 days and it was only stopped when according to Messrs Thakurdas and Co they discovered that the promises of the applicant to secure their costs were wholly illusory and not made with any *bonâ fide* intention of carrying them out Under these circumstances I consider that it is impossible to hold that Messrs Thakurdas and Co have acted in this matter otherwise than with perfect propriety, and I do not consider that they can be held to have discharged themselves within the meaning of the decisions relied upon by the applicant It must be noted that the demand for *payment* of costs was made after and not before the discharge of Messrs Thakurdas and Co Before their discharge they had only asked the applicant to hold himself liable for costs

It was then suggested that even if that were so Messrs Thakurdas and Co were bound to give this inspection on the ground that even if they had been discharged by the client as this was a suit of a representative character they could not embarrass the action of the Court in administering the estate of Essa bin Khalifa by withholding the inspection of these documents, but it is admitted that the main question in the suits will be whether the third and fourth defendants are the legitimate daughters of the said deceased Shaikh Essa bin Khalifa and as such entitled to a share in his estate, and it is principally for the purpose of proving their illegitimacy that this inspection is sought and I do not think that the inspection which the English decisions show the Solicitor is required to give in administration actions is for the purpose of determining such questions as this It is only incidentally that such a question would arise in an administration action and I gather from the cases that have been cited to me and others to which I have referred that the obligation on the Solicitor to give [illegible]

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and to produce documents in his possession over which he has a lien in an administration action is confined to those cases where they are essential to the determination of those questions which arise in the normal administration proceedings, when the estate is being actually administered *Boughton* v *Boughton*[1], *In re Capital Fire Insurance Association*[2]

Suit No 423 of 1907 was filed during the life time of Shaikh Essa by Aishabibi and Lulvabibi, daughters of Fatmabibi, claiming to be the legitimate daughters of the said Essa bin Khalifa by their mother Fatmabibi, and for the administration of the estate of Fatmabibi whom they alleged to be the wife of the said Essa bin Khalifa In that case Messrs Thakurdas and Co continued to be the Solicitors of the applicant and his brothers and subsequently of the applicant and his brother and nephew after the death of Essa bin Khalifa That suit is not referred to in the earlier correspondence On the 31st January 1910 Messrs Ardeshir, Hormusji, Dinshaw and Co wrote to Messrs Thakurdas and Co an urgent letter in which they say that the applicant had instructed them to act for him in Suit No 517 of 1908 To that Messrs Thakurdas and Co reply asking whether the applicant intended to change his attorneys also in Suit No 423 of 1907 and in Suit No 640 of 1908 In reply to that Messrs Ardeshir, Hormusji, Dinshaw and Co wrote on the 31st January to say that the applicant had instructed them to appear for him in Suit No 640 of 1908 and on the 4th February they wrote to say "we beg to inform you that Mr Ahmed bin Shaikh Essa Khalifa has instructed us to represent him *in the above suit" i e in Suit No 423 of 1907, and in all* these three Suits Nos 517, 640 and 423 the order of the change of attorneys was obtained at the instance and by the new Solicitors of the applicant In this state of things it seems quite clear that Messrs Thakurdas and Co have never refused to act as the attorneys of the applicant in Suit No 423 of 1907 and that the change of attorneys was entirely the applicant's own act I must, therefore, hold that he discharged Messrs Thakurdas and Co from their retainer Exactly the same dispute arises in

(1) (1883) 23 Ch D 169 (2) (1883) 24 Ch D 408.

that suit as in Suit No 517, namely the legitimacy or illegitimacy of these two ladies Aishabibi and Lulvabibi It appears to me that under these circumstances, therefore, and having regard to the English decisions and the jurisdiction that the Courts have exercised from time to time in these matters, that it is open to me to make such an order in these summonses as will meet the justice of the claims of the applicant on the one hand and the right of the Solicitor to be paid his costs on the other It is unfortunate that Messrs Thakurdas and Co have not taken more active steps to have the exact amount of the costs which they are entitled to recover from the applicant, specifically ascertained The only calculation they can make is a rough calculation that their costs may come to something like Rs 25,000 There is no clear indication anywhere in the affidavits put in on their behalf what exact proportion of this sum would be payable by the applicant In their letter of the 14th March 1910 Messrs Thakurdas and Co asked Messrs Ardeshir, Hormusji, Dinshaw and Co whether their client would pay them Rs 5,000 on account of costs and in another letter they ask whether he is willing to give a charge upon his share in the estate of his father That appears to me to be a perfectly reasonable proposal on the part of Messrs Thakurdas and Co, and I order accordingly that on payment by the applicant of the sum of Rs 5,000 and on his charging his share in the estate of his father to the extent of the balance of costs payable by him the summonses be made absolute, the applicant to pay the costs In default of this being done within a fortnight from the date of this order, the summons will be discharged with cost Affidavits taken as read

Attorneys for applicant Messrs *Ardeshir, Hormusji, Dinshaw and Co*

Attorneys for respondents Messrs *Thakurdas and Co*

K McI K

APPELLATE CIVIL

Before Mr Justice Chandavarkar and Mr Justice Heaton

1911 February 8

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT) APPELLANT v GAJANAN KRISHNARAO MAVLANKAR SON AND HEIR OF KRISHNARAO NARSINH (ORIGINAL PLAINTIFF) RESPONDENT *

Civil Procedure Code (Act XIV of 1882) section 424—Suit for injunction—Suit against Secretary of State for India—Notice—Inam—Resumption

The plaintiff an Inamdar of a village was called upon by the Collector to hand over the management of the village to Government officials on the ground that in the events that had happened the *inam* had become resumable by Government The plaintiff thereupon without giving the notice required by section 424 of the Civil Procedure Code (Act XIV of 1882) filed a suit against the Secretary of State for India in Council for a declaration that he was entitled to hold the village in *inam*, and for a permanent injunction restraining the defendant from resuming the village —

Held that the suit was bad in absence of notice required by section 424 of the Civil Procedure Code (Act XIV of 1882)

The term "act used in section 424 of the Civil Procedure Code of 1882 relates only to the public officers not to the Secretary of State

The expression no suit shall be instituted against the Secretary of State in Council" is wide enough to include suits for every kind, whether for injunction or otherwise

Per HEATON J—Where there is a serious injury so imminent that it can only be prevented by an immediate injunction, a Court will not be debarred from entertaining the suit and issuing the injunction though the section requires previous notice if it is owing to the immediate need of the injunction that the plaintiff has come to the Court for relief before giving the required notice

Flower v Local Board of Low Leyton(1), followed

APPEAL from the decision of R Knight, District Judge of Ahmedabad

This was a suit for declaration and injunction

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* First Appeal No 115 of 1906

(1) (1877) 5 Ch D 347

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In 1841, the East India Company granted to the plaintiff's father two villages in *inam*, which was conferred on him for three lives. The grantee Narso died in 1854, his eldest son died in 1882, and the eldest son of that son died in 1904 The Collector of Ahmedabad, thereupon, was of opinion that the terms on which the *inam* was granted had been fulfilled, and the *inam* had become resumable by Government On the 16th December 1904, he passed an order asking the Inamdar's family to hand over the management of the villages in question to Government officers The plaintiff, who was the last surviving son of Narso (the grantee), filed on the 17th December 1904 a suit against the Secretary of State for India in Council, praying for a declaration that under the terms of the grant he and his immediate successors were entitled to hold the villages in *inam*, and for a permanent injunction restraining the defendant from resuming the villages as long as the last of his immediate successors was living

The defendant contended in his written statement *inter alia* that the suit could not lie in absence of notice required by section 424 of the Civil Procedure Code of 1882, and that in the events that had happened the *inam* had become resumable

The District Judge held that the suit being one for injunction was maintainable though no notice was given under section 424 of the Civil Procedure Code of 1882 On merits, he passed a decree in plaintiff's favour granting him the declaration and injunction sought

The defendant appealed to the High Court

Strangman, with *R W Desai*, for the appellant —The term "act done in section 424 of the Civil Procedure Code of 1882, refers only to the public officer It has no reference to the Secretary of State for India in Council, for there really is, in point of law, no such person or body politic whatever as the Secretary of State for India in Council See *Kinlock v Secretary of State for India in Council*[1] The language of section 424 is general and no suit of any kind can lie against the Secretary of State without going through the preliminaries required by the

(1) (1880) 15 Ch D 1

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section See also *Hari* v *Secretary of State for India*[1], *Chhaganlal* v *Collector of Kaira*[2], *Secretary of State for India in Council* v *Rajlucki Debi*[3], and *Shahebzadee Shahunshah* v *Fergusson*[4] The suggested interpretation of section 424 is borne out by sections 428, 429 and 416 of the Code Section 80 of the new Code of Civil Procedure (Act V of 1908) also confirms our view See also the cases of *President of the Taluk Board, Sivaganga* v *Narayanan*[5], *Municipality of Faizpur* v *Manak Dulab*[6], and *Municipality of Parola* v *Lakshmandas*[7] The cases of *Attorney General* v *Hackney Local Board*[8] and *Flower* v *Local Board of Low Leyton*[9] are distinguishable as they were decided under statutes, the sections of which differed in language from that of the present sections

Lowndes, with *G S Rao* and *Ratanlal Ranchhoddas*, for the respondent —The present suit does not fall within the purview of section 424 of the Civil Procedure Code of 1882 The expression "an act purporting to be done" in the section refers also to the Secretary of State The comma after the first clause need not be looked to, for punctuation is no part of the statute See *Duke of Devonshire* v *O'Connor*[10], *Claydon* v *Green*[11], and Maxwell on Statutes 4th edition, page 62 Further, the present suit is not in respect of an act done, but is one to restrain an act threatened Such a suit does not fall within section 424 The principle that in a suit for injunction no preliminary notice is required applies to this case See *Flower* v *Local Board of Low Leyton*[9] and *Attorney General* v *Hackney Local Board*[8]

CHANDAVARKAR, J —*In my opinion, on a proper construction* of section 424 of the Civil Procedure Code of 1882, notice was necessary in this case as a condition precedent to suit The words in the section are "No suit shall be instituted against the Secretary of State in Council, or against a public officer in

(1) (1903) 27 Bom 424 at p 4 0
(2) (1910) 12 Bom L R 8?.
(3) (1897) ?5 Cal 239
(4) (1881) 7 Cal 499
(5) (1892) 16 Mad, 317
(6) (189?) 2- Bom 637
(7) (1900) 2? Bom 14?
(8) (1875) L R 20 Eq 6 6
(9) (187?) ? Ch D 347 at p 350
(10) (1890) 24 Q B D 468 at p 47?
(11) (1868) L R 3 C P 511 at p 52?

respect of an act purporting to be done by him in his official capacity From the repetition of the word "against", I think, the "act" described in the section was meant to relate only to the public officer, not to the Secretary of State It shows that the Legislature intended to differentiate between the Secretary of State and other public officers Further, if the words "in respect of an act," etc, had been intended by the Legislature to apply to the Secretary of State also, it would have been more appropriate to use the words "done by either" instead of the words 'done by him'

The question is not quite free from difficulty In *Secretary of State for India in Council v Rajlucki Debi*(1), Ameer Ali, J, construed the section in a different way In appeal from his decision Maclean, C J, was inclined to differ from that construction, but the appeal was decided on other grounds and so the learned Chief Justice's opinion was a mere *obiter dictum*

The considerations in support of the construction contended for by the learned Advocate General in support of the present appeal seem to me to be stronger than those urged for the other construction

But it is urged by Mr Lowndes for the respondent that, at all events, a notice is not necessary in a suit for an injunction against the Secretary of State, and in support of that the learned Counsel relies on the principle of the decision in *Flower v Local Board of Low Leyton*(2) as controlling the interpretation of section 424 of the Code of Civil Procedure No doubt in that English case it was held that in suits for an injunction no notice is necessary, but that was on the construction of the particular section of the Act there concerned The words of the section which had to be construed there were, "an act done or intended to be done or omitted to be done and the learned Judges held that upon a proper construction of the language of the section there, what the Legislature had in view was an act done, not an act threatened An injunction it was said there, is sought in respect of an act threatened, and, therefore, the words in question

(1) (1897) 25 Cal 239 (2) (1877) 5 Ch. D 347

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were held not to apply to a suit for an injunction. But that is not the case before us

If I am right in my construction of section 424, the words "no suit shall be instituted against the Secretary of State in Council" are wide enough to include suits of every kind, whether for injunction or otherwise It may be that in any particular case the circumstances might be such as to satisfy the Court that it was practically impossible to give a notice, because the act threatened was so imminent that the plaintiff was driven to a suit by the conduct of Government In such a case it might be that the Court would hold that no notice as a condition precedent to suit was necessary

But that would be not because of the law in section 424 of the Civil Procedure Code but because of the introduction into the suit of another law, *viz*, that the defendant by his conduct had brought about a state of things which prevented the plaintiff from complying with the provisions of the section in question

No such case arises here On the ground, therefore, that no notice was given by the plaintiff as required by section 424, the suit must be held bad The decree of the Court below must be reversed and the suit dismissed with costs throughout upon the respondent

HEATON, J —I am of the same opinion as to the construction of section 424 I am unable to understand how *Flower's case*[1] is an authority for saying that a suit is excluded from the operation of section 424 of the Civil Procedure Code because it is a suit for an injunction On this point the observations of the Chief Justice of Bengal reported in the case of the *Secretary of State for India in Council* v *Rajlucki Debi*[2] are very pertinent We cannot take *Flower's case* as an authority for the construction of a section in an entirely different Act, in different terms, and for a different purpose We can at best only look to the principle underlying the decision there The princi[illegible] f that case is not, as I understand that the words of [illegible] section as that under co[illegible] hough in terms c[illegible] such a suit, cannot apply t[illegible] r an injunctio[illegible]

(1) (1877) 5 Ch D 347 (2) 2[illegible] Cal 239

meaning so far as it is general is I think this where there is a serious injury so imminent that it can only be prevented by an immediate injunction, a Court will not be debarred from entertaining the suit and issuing the injunction though the section requires previous notice, if it is owing to the immediate need of the injunction that the plaintiff has come to the Court for relief before giving the required notice The reason is that to wait until the due notice had been given would be to allow the injury which it is the object of the suit to prevent so there would be a clear denial of justice The principle is that in construing an Act we are to read the words in the light of the object of the Act and are to presume that a consistent purpose underlies those words The purpose of the Code of Civil Procedure broadly put, is to regularise and facilitate the work of the Courts, so that they may be best able to do justice That purpose would no doubt be defeated if an injunction were immediately required and absolutely necessary in order to prevent serious injury and yet the Court could not issue it It must be presumed that this is not intended unless it is specifically expressed To that extent, speaking for myself, I would follow the principle of *Flower's case* But of course one would have to be very clearly satisfied that an immediate injunction was absolutely essential There is no indication here that serious and irreparable injury would follow from failure to obtain an immediate injunction, or that any injury whatever, which could not be amply and appropriately recompensed by damages, would ensue from delay in issuing an injunction

Decree reversed

I R

CRIMINAL REVISION *

Before Mr Justice Chandavarkar and Mr Justice Heaton

1911. March 6

EMPEROR v NOOR MAHOMED SULEMAN AND ANOTHER

Indian Penal Code (Act XLV of 1860), sections 283 114—Obstruction in public way—Toy shop on a street—Exhibition of toys in the shop window—Collection of crowd of persons in street—Obstruction

The accused who had a toy shop in a public street exhibited in the window of the shop overlooking the street, certain clockwork toys during a Diwali festival. The result of the exhibition was that thousands of people collected on the road to witness the toys there were dangerous rushes in consequence, people were knocked down and great obstruction and danger were caused to those using the road On these facts the accused were convicted of offences punishable under sections 283 and 114 of the Indian Penal Code —

Held, upholding the conviction, that there were obstruction, danger and injury to the persons using the public way which amounted to a public nuisance, and that the efficient cause of the nuisance was the act of the accused

Ordinarily every shop keeper has a right to exhibit his wares in any way he likes in his shop but he must exercise the right so as not to cause annoyance or nuisance to the public

Attorney General v *Brighton and Hove Co operative Supply Association*(1), followed

THIS was an application to revise convictions and sentences passed by A H S Aston, Chief Presidency Magistrate of Bombay

The accused, two in number, were the manager and servant respectively, of a toy shop in Shekh Memon Street in the City of Bombay During the Diwali festival, the accused exhibited in their shop moving toys, which were effigies of a lion, a tiger and a cock There was also an electric bell which rang causing a spark of electricity In consequence of the exhibition, thousands of people collected in front of the shop there were dangerous rushes and people were knocked down The accused were asked by the police to stop the effigies, but they did not obey

The accused were, upon these facts, convicted by the Chief Presidency Magistrate of Bombay of offences under sections 283

* Criminal Application for Revision No 419 of 1910

(1) [1900] 1 Ch. 276

and 114 of the Indian Penal Code, and were sentenced each to pay a fine of Rs 25 The accused applied to the High Court under its criminal revisional jurisdiction

Lowndes, with *V F Vicaji* for the accused —Section 283 of the Indian Penal Code does not apply It deals only with physical obstructions in a street This is clear from the position the section occupies in the chapter in which it is placed Further as long as a trader does a thing in the legitimate exercise of his trade he cannot be penalised under the section, if a crowd of people collects in front of his shop Refers to *Rex* v *Carlile*[1]

G S Rao, Government Pleader, for the Crown —The terms of section 283 of the Indian Penal Code are wide enough to include the present case A trader undoubtedly has a right to exhibit his wares for sale in his shop window but he must not do so in a manner to draw a large crowd of people in the street thereby Refers to *Rex* v *Moore*[2] and *Walker* v *Brewster*[3]

CHANDAVARKAR, J —The facts of this case are shortly these The two petitioners manager and servant respectively of a toy shop in Sheikh Memon Street, exhibited in the windows of the shop, overlooking the public road, certain clockwork toys during the last Diwali festival The result of the exhibition was that thousands of people collected on the road to witness the toys The Magistrate finds on the evidence that there were dangerous rushes in consequence, people were knocked down, and great obstruction and danger were caused to those using the road The petitioners were asked by the police to stop the exhibition but they did not obey

There can be no doubt upon these findings on the evidence that there were obstruction, danger and injury, to the persons using the public way, which amounted to a public nuisance

The only question is whether that nuisance was caused by the petitioners

The efficient cause of the nuisance was the act of the petitioners It consisted in the manner in which they worked the

(1) (1834) 6 C & P 636 (2) (1832) 3 B & Ad 184
(3) (1867) L R 5 Eq 25 at p 33

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toys in their shop their object was to attract a crowd, they knew that a crowd would be, *and as a matter of fact* was, attracted by what they did, and they must be regarded as having intended that consequence It follows that the nuisance was caused by them

But it is urged that what they did was in the course of reasonable user of their business on their own premises The question of reasonable user is one of time place and circumstance *It must be decided with reference to all the facts of the case in* which it arises Ordinarily, every shop keeper has a right to exhibit his wares in any way he likes in his shop, but he must exercise the right so as not to cause annoyance or nuisance to the public As was said by Romer, L J, in *Attorney General* v *Brighton and Hove Co operative Supply Association*[1], "it does not follow that, because the user is necessary or useful for the purpose of carrying on the business, it must of necessity be held to be a reasonable user" And the law, as explained by Lindley, M R, in the same case is that "in a case of doubt or difficulty, the private reasonable right of a householder to carry on his business must yield to the public right of user of the *street*"

In the present case the petitioners were aware that their act was causing danger and obstruction to the public way They were warned and yet did not desist And it can hardly be said that the manner of the exhibition complained of as a nuisance was necessary *for the purposes of their business* in the sense that without it they could not have carried it on reasonably

The rule must, therefore, be discharged, and the convictions and sentences confirmed

Rule discharged

E. R.

(1) [1900] 1 Ch 276

APPELLATE CIVIL

Before Sir Basil Scott, Kt, Chief Justice and Mr Justice Batchelor

COWASJI TEMULJI AND OTHERS EXECUTORS OF HIRJIBHAI DECEASED (ORIGINAL PLAINTIFFS) APPELLANTS *v* KISANDAS TICUMDAS AND ANOTHER (ORIGINAL DEFENDANTS) RESPONDENTS * — 1911 *March 8*

Mortgage—Consent decrees between mortgagors and mortgagee—Joint management—Equal division of rent and produce—Prohibition against partition—Mortgagee competent to grant mirasi *lease—Mortgagors to get one fourth of the* nazarana *(present)—Rights of the mortgagors conveyed to the mortgagee—Equitable mortgage by mortgagee—Settlement by mortgagee in favour of his relations—Suit by equitable mortgagee—Decree—Execution—Auction purchaser put in possession—Suit by donees under the settlement—Donees entitled to possession—Rights of the parties to be worked out by amicable settlement or by a suit—Suit by representatives of auction purchaser to recover one fourth share by partition—Plaintiffs entitled to possession of the share as tenants in common—*Mirasi *lease by mortgagee's assignee without mortgagor's consent—Lease not to enure for the benefit of the assignee*

The owners of certain land mortgaged it to S In the year 1866 consent decrees Exhibits 57 and 58 were passed between the mortgagors and the mortgagee S The consent decrees provided that both parties should jointly carry on the management of the land each being entitled to half of the pro[illegible] and rent that the land itself should not be partitioned that S was compe[illegible] grant a *mirasi* lease provided the *nazarana* (present) accepted was not less [illegible] Rs 500 and that the said *nazarana* should be divided between the m[illegible] and S in the proportion of ¼ and ¾ respectively The said rights [illegible] mortgagors were subsequently conveyed by them to S for [illegible] Exhibit 64 Afterwards S in April 1891 deposited Exhibit [illegible] by [illegible] equitable mortgage with two persons In October 1891, S settl[illegible] which was subject to the equitable mortgage on his relatives [illegible] 1892 the two equitable mortgagees sued S to recover their equit[illegible] debt and got a decree against the property equitably mort[illegible] personally The property was put up for sale in execution [illegible] H for Rs 5,195 which covered the claim of the equitable mortg[illegible] M obstructed the auction purchaser H in his attempts to [illegible] and their obstruction having failed they brought a suit [illegible] final decree in the suit made a declaration that [illegible] were entitled to the properties and their possession [illegible] veyed to the mortgagee S under Exhibit 64 and [illegible] H, and that "the rights of the parties as thus declar[illegible] amicable settlement between them or by means of a [illegible] by

* Second Appeal No 518 of 1[illegible]

The plaintiffs as executors under the will of H, deceased, who was deprived of possession under the aforesaid decree, having brought a suit against the assignees of J and M to recover by partition ¾ share of the land the lower Courts dismissed the suit for the recovery of ¼ share by partition on the ground that the clause in the consent decrees, Exhibits 57 and 58, affected to prohibit partition

On second appeal by the plaintiffs

Held reversing the decree, that though the plaintiffs as tenants in common would be entitled to partition yet by virtue of the consent decrees they were estopped from exercising such right

Held further that though the consent decrees did empower the mortgagee S to grant a *mirasi* lease without the mortgagor's consent yet this power did not enure for the benefit of his assignee

SECOND appeal from the decision of R D Nagarkar, First Class Subordinate Judge of Poona with appellate powers, reversing the decree passed by D G Medhekar, Joint Subordinate Judge of Haveli

The facts were as follows —

The land in dispute originally belonged to Shekh Sadudin, Mohamad Latiff and Nurunisabi They had mortgaged it to W Spiers In the year 1864 disputes having arisen between the mortgagors and the mortgagee, the mortgagors filed suits, Nos 37 and 38 of 1866, against mortgagee and, on the 10th March 1866, they got consent decrees which provided that both the parties should carry on the *vahivat* of the land, each being entitled to half of the produce, that the rent should be divided equally between them that the land itself should not be partitioned, that the mortgagee W Spiers was to be competent to grant a *mirasi* lease, provided the *nazarana* (present) accepted was not less than Rs 500, and that the *nazarana* should be divided between the mortgagors and the mortgagee in the proportion of ¼ and ¾ respectively, Exhibits 57 and 58

Subsequently, on the 25th October 1890, the mortgagors conveyed their rights under the said consent decrees to the mortgagee W Spiers for Rs 4,000 by Exhibit 61 On the 11th April 1891 W Spiers deposited Exhibit 64 by way of equitable mortgage with two persons Manekji and Mancherji Some months after the equitable mortgage, that is, on the 18th

October 1891, W Spiers, who was then in involved circumstances, settled the property comprised in Exhibit 64 on James and Mary Spiers his son and daughter in law respectively

In the year 1892 the equitable mortgagees, Manekji and Mancherji, brought a suit, No 143 of 1892, against W Spiers to recover their mortgage debt by sale of the property equitably mortgaged and from the defendant personally A decree was accordingly passed against the defendant, and in execution the property being sold, it was purchased by one Hirjibhai Dhanjisha, since deceased, for Rs 5,425 and the claim of the equitable mortgagees was thereby satisfied

James and Mary Spiers, the donees under the settlement made by W Spiers, offered resistance to the delivery of possession to the auction purchaser Hirjibhai and their resistance having failed, they *filed a suit, No 95 of 1895, against Hirjibhai* praying that they should be given possession of the property, or that they should be allowed to redeem, or that it should be declared that the auction purchaser Hirjibhai was entitled only to the interests conveyed to W Spiers by Exhibit 64 The proceedings went up to the High Court in second appeal No 65 of 1897 and the concluding portion of the High Court's decree ran thus —

The result is that the plaintiffs (James and Mary Spiers) are entitled to a declaration that they are entitled to as against the defendant (Hirjibhai) the properties described in the plaint and to the possession thereof subject to the defendant's right to the interest conveyed to W Spiers by the deed of the 25th October 1890 and subsequently purchased by the defendant The rights of the parties thus declared must be worked out by amicable settlement between them or by means of a separate suit In this suit brought on a ten rupees *stamp we can only make a declaration of rights*

Hirjibhai being deprived of possession under the High Court's decree, the plaintiffs, claiming as executors under his will, brought the present suit against defendant 1 who was the assignee of James and Mary Spiers, the donees under the settlement of W Spiers, and against defendant 2, who was a lessee under a *miraspatra* from defendant 1, to recover by partition one fourth *share of the land described in the plaint, alleging that it was* purchased by the deceased Hirjibhai at a court sale and was in

his possession, that thereafter the son and daughter in law of W Spiers brought a suit against Hirjibhai and in consequence of the suit and final decree passed therein by the High Court in the second appeal the property went into the possession of defendant 1, that, according to the decree of the High Court, Hirjibhai acquired one fourth of the land in suit, that defendant 1 had fraudulently executed a sale deed in respect of the land to defendant 2, that defendant 1 had no right to sell plaintiffs' share to defendant 2 without plaintiffs' consent, and that the cause of action arose on the 14th December 1897 when the deceased Hirjibhai was deprived of the possession under the High Court s decree

Defendant 1, Kisandas Ticumdas, answered *inter alia* that the plaintiffs had no right to claim one-fourth of the land in suit, that the de ceased Hirjibhai had acquired some rights from W Spiers under the sale deed of the 25th October 1890, but that right entitled Hirjibhai to receive only one fourth of the price of the land and the assessment in case the land was transferred under a *miraspatra* and this right had never been interfered with, that the defendant sold the property in suit together with another property under a *bonâ fide* sale, that the deceased Hirjibhai was called upon by a notice to execute a *miraspatra* and other papers, but the notice was not complied with and thus the defendant alone had to execute a *miraspatra* in favour of defendant 2 and that the plaintiffs could not claim anything beyond what was given by the consent decrees in suits Nos 37 and 38 of 1866

Defendant 2, Sorabji Dadabhai Dubash, replied that the auction sale on which the plaintiffs claimed conferred on them no higher rights than those acquired by W Spiers under his sale deed of the 25th October 1890, that those rights only were held under the decree of the High Court to have passed to Hirjibhai, that the plaintiffs were not entitled to actual partition of the land, that the defendant had not purchased the land but had taken it in *miras*, that he was, therefore, not liable to the suit in the form in which it was framed and that the claim was barred under section 13 of the Civil Procedure Code (Act XIV of 1882)

The Subordinate Judge found that the deceased Hirjibhai purchased at the court sale relied upon by the plaintiffs only the interest conveyed to W Spiers by Sadudin and Mohamad Latiff, plaintiffs in suits Nos 37 and 38 of 1866, under their sale-deed of the 25th October 1830 and that this interest consisted of the right to enjoy the land in common with W Spiers and to divide its profits equally without dividing the land, the right to receive one fourth share of the *nazarana* in case of the transfer of the land by *miras* and to receive Rs 5 per *bigha* per year as assessment from the transferee, that the claim was time barred, that the frame of the suit was bad, that the plaintiffs were not entitled to have by partition one fourth of the land in suit, that the plaintiffs' claim was barred under section 13 of the Civil Procedure Code (Act XIV of 1882) by reason of the consent decrees in suits Nos 37 and 38 of 1866, which prohibited partition of the land, and that the suit was not bad for misjoinder of parties and causes of action On the said findings the Subordinate Judge dismissed the suit

The plaintiffs appealed and the defendants preferred cross-objections The appellate Court found that the plaintiffs' claim for partition was barred by decrees in suits Nos 37 and 38 of 1866 that the judgment of the High Court in the second appeal gave to deceased Hirjibhai no higher rights in the plaint property than the right to the interest conveyed to W Spiers by Exhibit 64 and purchased by Hirjibhai at the auction sale, that defendant 1 was entitled to transfer the land to defendant 2 by way of *miras* without the consent of deceased Hirjibhai and that the amount of *nazarana* realized by defendant 1 was Rs 2,500 The appellate Court, therefore, reversed the decree and allowed to the plaintiff Rs 625, that is, one fourth of the money realized by defendant 1 from defendant 2 by way of *nazarana*

Plaintiffs preferred a second appeal

Raikes with *S V Bhandarkar* for the appellants (plaintiffs)

N V Gokhale for respondent 1 (defendant 1)

Weldon with *P P Khare* for respondent 2 (defendant 2)

BATCHELOR, J —The plaintiffs, who are the appellants here, brought this suit as executors of the will of Hirjibhai Dhanjisha,

[illegible]

and [illegible] in the plaint was [illegible] the plaint [illegible] share in the land [illegible]. The [illegible] that the plaintiffs has acquired any share or [illegible] in the land. The first question which arises is [illegible] what [illegible] the plaintiffs have in the land, and [illegible] to partition. The plaintiffs [illegible] the original owners Shaikh Sanaulla and [illegible] mortgaged [illegible] W. Spain.

The [illegible] plaintiffs' [illegible] has to be ascertained [illegible] which have been passed on [illegible] the property. The [illegible] are Exhibits 57 and 58 and [illegible] consent in 1859 in order to terminate a [illegible] which had arisen in 1858 between the original owners and the mortgagee, W. Spain. In substance these [illegible] provide that both parties [illegible] carry on the [illegible] of the land [illegible] of the produce [illegible] should be divided equally between them; that the [illegible] partition; that W. Spain was to be [illegible] to grant a [illegible] was [illegible] Rs. [illegible] and [illegible] between Shaikh Sanaulla's party and W. Spain in the [illegible].

Such then were the rights which Shaikh Sanaulla and his [illegible] were [illegible]. These rights were, on [illegible] October 18[illegible], by means of Exhibit [illegible] conveyed by Shaikh Sanaulla and the [illegible] to W. Spain for a consideration of Rs. [illegible] the only [illegible] the right to take half the produce of the land, and the [illegible] to be [illegible].

Next, on 11th April 1891, the [illegible] Exhibit [illegible], was [illegible] by W. Spain by way of equitable mortgage with two persons [illegible] and [illegible], who [illegible] mortgagees [illegible] the [illegible] by W. Spain by Exhibit [illegible].

On [illegible] October 1891 W. Spain, being then [illegible] in [illegible], sold the property on [illegible] and [illegible] Spain. The property was then [illegible] and [illegible] mortgage.

In 1892 Manekji and Mancherji brought Suit No 143 against W Spiers to recover their mortgage money by sale, and they obtained a decree against the property equitably mortgaged and against the defendant W Spiers personally In pursuance of that decree the property equitably mortgaged was put to sale, and was purchased by the deceased Hirjibhai for Rs 5,425, *which covered the claim of the equitable mortgagees*

James and Mary Spiers obstructed Hirjibhai in his attempts to obtain possession after his purchase, and, as they were unsuccessful in the proceedings taken on their obstruction, they brought against Hirjibhai Suit No 95 of 1895 in which they prayed that they might be given possession of the entire property, or that they should be allowed to redeem, or that it should be declared that Hirjibhai was entitled only to the interests conveyed to W Spiers by Exhibit 64 In that suit the final decree was made by this Court which gave to James and Mary a declaration that as against Hirjibhai, they were entitled to the properties and to the possession of them subject to Hirjibhai's right to the interest conveyed to W Spiers by Exhibit 64 and subsequently purchased by Hirjibhai and the Court added that "the rights of the parties as thus declared must be worked out by amicable settlement between them or by means of a separate suit" The plaintiffs now bring this suit in order, as they claim, to work out the rights accrued to them

The defendant 1 is the purchaser of the interests of James and Mary Spiers under a deed dated 16th December 1896

From what we have already said it follows that the plaintiffs, as executors of Hirjibhai, are entitled only to those rights which by Exhibit 64 were conveyed to W Spiers those rights are recited in the consent decrees, Exhibits 57 and 58, and have been described by us above This was the view of the lower appellate Court, and we cannot doubt that it was so far right But then that Court refused the plaintiffs' prayer for partition, being of opinion that that claim could only be "based upon the allegation that the judgment of the High Court gave the plaintiffs higher rights than were reserved to Sheikh Sadudin and the two others under the decrees Exhibits 57 and 58" It is

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COWASJI TEMULJI v. KISANDAS ICCUMDAS

here that we are unable to follow the learned Subordinate Judge Apart from that clause in the consent decrees which affects to prohibit partition, we think it clear that, as tenants in common, the plaintiffs would be entitled to partition

But the question is whether in this suit the plaintiffs are entitled to give the go by to a particular clause in an existing decree on the ground that that clause, if resting on no higher authority than the agreement between the parties, would be bad in law We think that this question must be answered in the negative It may be—though we express no opinion as to this—that in a suit properly framed for that purpose the plaintiffs might have been able to get the decree set aside But no such suit has been brought, and the decree is a subsisting decree, nor does it, we think, make any difference that it was taken by consent of the parties who were all *sui juris* The decree stands, and, while it stands, it operates as an estoppel between the then parties and their present representatives Authority for this view may be found in *Huddersfield Banking Company Limited*, v *Henry Lister & Son, Limited*[1] That was an action brought by the Banking Company for the specific purpose of setting aside a consent order as having been obtained under a mistake as to material facts, and the Court of Appeal affirming Vaughan Williams J set aside the order The decision might assist the plaintiffs if they were suing to set aside the consent decree but, as we have said that is not their suit, and the consent decree is still outstanding against them That being so their case upon this point is exposed to the observations of Lindley, L J, where he says "A consent order, I agree is an order, and so long as it stands it must be treated as such, and so long as it stands I think it is as good an estoppel as any other order I have not the slightest doubt on that" In our opinion, therefore, it is not competent to the Court in this suit to override one particular clause in a subsisting decree It follows that the plaintiffs are not entitled to partition

Then it was urged that the decrees did not empower Spiers to grant a *mirasi* lease without the plaintiffs' consent, but upon a

(1) [1895] 2 Ch 273

fair reading of the material passages in the decrees we agree with the lower Court that that is unmistakably their effect and meaning We do not, however, think that this condition enures for the benefit of the present defendant 1, who is merely an assignee from Spiers The agreement embodied in the decrees points, we think, to the view that the individual Spiers was a person in whom the parties had confidence and that for this reason he was entrusted with the special power in question Such a contract, importing the consideration of personal skill or confidence, would not be assignable, it would not be open to the contractor to substitute the skill or credit of an assignee (Leake on Contract, 4th edition, p 826, and the cases there cited)

On the whole, therefore we think that the plaintiffs are so far right that the defendant 1 was not entitled, without their consent, to grant the *miras* lease to the defendant 2, and it must be declared that the lease does not bind the plaintiffs' share in the land nor does it affect the plaintiffs' right to joint possession

The plaintiffs' claim to interest must be disallowed

For these reasons we must reverse the decree under appeal and make a decree awarding joint possession to the plaintiffs Appellants to have their costs of the appeal, the other costs to be borne by each party

Decree reversed

O I R

ORIGINAL CIVIL

Before Sir Basil Scott' Chief Justice

1910
September 3

IN RE TRUSTEES AND MORTGAGEES POWERS ACT (XXVIII OF 1866)

AND

IN RE TRUST OF SHETH KHULFANBHOY DAMANI

SIR CURIMBHOY EBRAHIM, BART AND ANOTHER PETITIONERS

Trustees and Mortgagees Powers Act (XXVIII of 1866)—Trust deed—Application by trustees to divert funds to other objects—Trustees opinion—Cypres doctrine

The surviving trustees of a fund founded with the object of distributing food amongst such poor persons as might assemble at certain stated times and places petitioned the Court under section 43 of the Trustees and Mortgagees Powers Act to divert the fund to more useful purposes on the grounds that in their opinion the charity tended to pauperise the recipients thereof and to encourage thriftlessness and laziness and vagrancy and to produce other undesirable results that the donor's intention was to benefit the poor of Bombay and the best way to carry out his intention would be to devote the trust funds to the education of poor boys

Held that the application was entirely misconceived so far as the Act was concerned as the word trustees has been deleted in section 43 of the Trustees and Mortgagees Powers Act of 1883 Even if the Act applied the Court could not under section 43 do more than give advice or directions It could not pass any order which would in any way alter the duties of the trustees under the trust-deed

Held further, on the merits of the application that the trustees had no justification for coming to the Court to try and get their duties under the trust deed altered according to their ideas of what was fit and proper

In re Weir Hospital(1) referred to

THE material facts of this case are set out in the judgment

Jinnah for the applicants

SCOTT, C J —This is an application purporting to be made under the Trustees and Mortgagees Powers Act XXVIII of 1866 and in the matter of Sheth Khulfanbhoy Damani's trust by the surviving trustees

(1) [1910] 2 Ch. 124.

The petition states that Khulfanbhoy Damani, a Khoja Mahomedan merchant, purchased two Government Promissory Notes of Rs 5,000 each for the purpose of establishing a charity for distributing dry food to the poor, and by an indenture of trust of the 14th of September 1897 assigned the Government Promissory Notes to and deposited the same in the Bank of Bombay, in the names of the parties to the deed of the second part for the benefit of the charity The trusts particularly described in the deed are the purchase of rice and other articles of food, namely roasted gram, parched rice, beaten rice, and grain called *dhani*, and the distribution of the same every Friday morning at such hours as the trustees might fix for the purpose amongst such poor persons as might assemble at that time for the purpose of receiving the same at or near the mosque or Dargah of Syed Mahomedshah belonging to the Khoja caste situate in Chatri Sarang street without regard being had to nation, caste or creed And it was also declared by the deed that such distribution and all questions relating to such distribution should be in the absolute and uncontrolled discretion of the trustees for the time being

The trustees state that the distribution of food has for the last thirty five or forty years been of baked wheaten bread called Nan at or near the donor's residence at Nishanpada Road every Friday The cost of such distribution amounts to a sum falling not far short of the income of the fund

The petitioners state that they are convinced that—

'The charity tends to pauperise the recipients thereof and to encourage thriftlessness and laziness and vagrancy and to produce other undesirable results The persons who receive the benefit of the charity are not poor at all or deserving but are able bodied vagrants capable of earning their livelihood by manual labour The distribution of bread once a week does no good at all to anyone The distribution of grain as provided in the trust deed would be the merest waste of money The donor's intention was to benefit the poor of Bombay and the best way to carry out his intention would be to devote the trust funds to the education of poor boys The distribution of grain might have been a desirable form of charity in 1897 when the trust deed was made although that too is doubtful but at the present day it is utterly useless as a means of relieving distress and on the contrary increases the evils of poverty to a serious extent Several charities of a useless nature have recently been

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KHUIFAN THOY PAVANI IN RE TRUST OF

TRUSTEES AND MORTGAGEES POWERS ACT IN RE

CURIMBHOY EBRAHIM BART IN RE (Sir)

directed by this Honourable Court into useful channels and the petitioners pray that the same course might be adopted in this case to the great benefit of people in need'

The application is apparently made under a section of an Act which does not apply to trustees, because the word "trustees' has been deleted in section 43 of the Trustees and Mortgagees Powers Act by the Trusts Act of 1882 The petition must, therefore, fail in that it is entirely misconceived so far as the Act is concerned Even if the Act applied, the Court could not, under section 43, do more than give advice or directions It could not pass any order which would in any way alter the duties of the trustees under the trust deed

With regard to the merits of the application, it is desirable, having regard to the frequency of such applications in this Court, to call attention to the recent pronouncement of the Court of appeal in England with regard to *Cypres* applications, delivered in the case of *In re Weir Hospital*(1)

The Master of the Rolls there said —

'The first duty of the Court is to construe the will and to give effect to the charitable directions of the founder assuming them not to be open to objection on the ground of public policy The Court does not consider whether those directions are wise or whether a more generally beneficial application of the testator's property might not be found There are many charitable purposes which according to modern views are productive of more harm than good—for example doles in money or kind But apart from such statutory power as is expressly conferred by section 30 of the Endowed Schools Act, 1869 the Court must give effect to a testator's directions as to doles

In my opinion the trustees had no justification for coming to the Court to try and get their duties under the trust-deed altered according to their ideas of what is fit and proper, and they must pay the costs of the application out of their own pockets

It is, however, said that an application was necessitated by the fact that the Bank of Bombay declines to credit the interest on the Government Paper, the subject of the trust, to the account of the petitioners as surviving trustees without an order of the Court, but it is clear that the reason for this objection on the part of the Bank of Bombay is that the trustees have not taken

(1) [1910] 2 Ch 124 at p 131

proper steps to have the Government Paper put into their names as survivors Any order which is required could have been made upon an application under Act XXVII of 1866 But no such application has been made Therefore, I do not think the trustees can save their costs by any reference to the objection of the Bank of Bombay

1910

KHULFAN BHOY DAMANI *In re* TRUST OF

TRUSTEES AND MORTGAGEES POWERS ACT *In re*

CURIMBHOY EBRAHIM, BART., *In re* (SIR)

I, therefore, dismiss the petition, ordering the trustees personally to pay the costs of the Advocate General as between attorney and client

Attorneys for the applicants Messrs *Edgelow, Gulabchand, Wadia & Co*

Attorneys for the opponents Messrs *Little & Co*

Application dismissed

B N L

ORIGINAL CIVIL

Before Mr Justice Beaman

CHOBEY SHRIGOPAL CHIRANJILAL AND OTHERS, PLAINTIFFS *v* DHANALAL GHASIRAM, DEFENDANT *

1910
December 23

Limitation—Debt entered in schedule filed by Insolvent—Acknowledgment—Limitation Act (IX of 1908) section 19

Where an Insolvent has written down a debt in his schedule as owing that debt to a named person and has signed the schedule that is a sufficient acknowledgment under section 19 of the Indian Limitation Act (IX of 1908), to extend the period of limitation

THE defendant firm drew four hundies on Mansaram Chajulal, one for Rs 2,500 dated 26th December 1906 and payable 31 days after date, and three for Rs 2,500, Rs 2 000 and Rs 1 500 respectively, dated 20th January 1907 and payable at sight All these were negotiated by the plaintiffs, in whose favour they were drawn, but subsequently, in consequence of the drawee dishonouring the hundies, the plaintiffs had to pay the amounts

* Suit No 246 of 1910

1910

CHOBEY SHRIGOPAL CHIRANJILAL v DHANALAL GHASIRAM

thereof to their indorsees These amounts they endeavoured to recover from the defendant firm, but without success On 4th March 1907 the partners in the defendant firm filed their petition in insolvency, and a vesting order was made On 18th March 1907, the insolvents filed their schedule, in which (*inter alia*) they entered a debt of Rs 7,679 9 0 as due to the plaintiffs in respect of the aforementioned hundies

The plaintiffs filed this suit on 16th March 1910 to recover the sum of Rs 7,679 9 0 from the defendants The question of limitation was raised, but the plaintiffs contended that the entry of the debt in the schedule was a sufficient acknowledgment within section 19 of the Limitation Act, and that the suit was not barred

Jinnah appeared for the plaintiffs

Jafferbhai appeared for the defendant

BEAMAN, J —An interesting and as far as India is concerned, I believe, an entirely new point has been raised in this case The defendant contends that the inclusion by him of the debt sued for in his schedule, while seeking the benefit of the Insolvency Act, is not an acknowledgment within the meaning of section 19 of the Indian Limitation Act, and does not extend the period within which the plaintiff can bring this suit

Mr Jaffer has cited four English cases (*Everett* v *Robertson*[1], *Ex parte Topping*[2] *Davies* v *Edwards*[3], *Courtnay* v *Williams*[4]) which appear to be exactly in point The English Courts seem to have felt no hesitation in deciding that the mere inclusion of a debt in a Bankrupt's schedule was not such an acknowledgment as the law required and would not operate to extend the period of limitation The reason of those decisions seems to be that in England the law requires such an acknowledgment to be a legal, and a legally enforceable, promise to pay The learned Judges do not appear to have founded their conclusions upon a proposition to be found in the text book writers (*vide* Banning on the Limitation of

(1) (1858) 28 L J Q B 23
(2) (1865) 34 L J Bank 44
(3) (1851) 7 Exch 22
(4) (1844) 13 L J Ch 461

Actions, 3rd Edition, p 250) that a Bankrupt cannot give a valid acknowledgment, and a perusal of the cases cited in support of that proposition suggests that the point is different Had this formed any part of the ground of decision in the four cases mentioned, the Judges would surely have adverted to it

The English Courts were administering the law contained in the Statutes of 21 James, c 16, s 3 and 9 Geo IV, c 14, s 1 The language of those Statutes is much narrower than, and easily distinguishable from the language of the Indian Statute of Limitations Section 19 is couched in much wider and more comprehensive terms, and is advisedly made to embrace every case in which a debtor has acknowledged and signed or has made in writing and signed an acknowledgment of a debt, although the acknowledgment may not have been to the creditor, or may have been accompanied by a refusal to pay In such cases the reasoning of the English Judges would not apply Reading the language of our Statute in its natural sense, I do not see how it can be successfully argued that when a debtor puts a debt down in his schedule, which he signs, this is not an acknowledgment in writing duly signed, of that debt, although it is not made directly to the creditor, and might not be a legal promise to pay Our Statute advisedly contemplates a much larger class of cases, and seems to rest upon quite a different principle from that which the Courts in England have applied to the more restricted language of their Statutes Broadly the Indian law on this point is that when a debtor has deliberately (this is guaranteed by the conditions that he must have used writing and signed it) acknowledged a debt, he will not be allowed to repudiate it, as from its moment of incidence, but only as from the moment of that confession This is something like estoppel, though it is not estoppel It might be difficult to place the underlying policy of section 19 of the Limitation Act, exactly among our legal principles But it is plainly different from the narrow ground of the English cases, refusing any extension of the period of limitation except upon what is a legal and legally enforceable later promise to pay And I am quite clear that where an Insolvent has written down a debt in his schedule, as owing that debt to a named person, and has signed the

1910

CHOBEY SHRIGOPAL CHIRANJILAL v DHANALAL GHASIRAM

schedule, that is a sufficient acknowledgment under section 19 of the Indian Limitation Act, to extend the period of limitation

I may observe in passing, that in England time would not run against an Insolvent after the vesting order, for the reason that all his assets thereupon vest in the Official Assignee as trustee for the creditors But there does not appear to be anything in our Statute of Limitation, to stop time running once it had begun to run, for any such reason

K McI K

APPELLATE CIVIL

Before Mr Justice Chandavarkar and Mr Justice Heaton

1911 *April 3*

HUSSEINKHAN SARDARKHAN (ORIGINAL DEFENDANT) APPELLANT, v GULAB KHATUM WIFE OF HUSSEINKHAN SARDARKHAN (ORIGINAL PLAINTIFF), RESPONDENT *

Mahomedan law—Dower—Prompt dower—Payment of—Restitution of conjugal rights—Consummation of marriage—Suit for prompt dower not premature before consummation

Under Mahomedan law, the Court may hold that the whole of the dower is exigible, in cases where no specific amount of the dower has been declared exigible and there has been no evidence of what is customary

Fatma v *Sadruddin*(1) followed

Prompt dower (*i e muajjal*) is payable immediately on the marriage taking place and it must be paid on demand It is only by payment of the prompt dower that the husband is entitled to consummate the marriage or enforce his conjugal rights Therefore the right to restitution, so far from being a condition precedent to the payment of prompt dower, arises only after the dower has been paid

Ranee Khejoorunnissa v *Ranee Ryeesunnissa*(2) followed

SECOND appeal from the decision of G D Madgavkar, District Judge of Surat, confirming the decree passed by N R Majmundar, Joint Subordinate Judge at Surat

* Second Appeal No 135 of 1910

(1) (1865) 2 Bom H C R 291

(2) (1870) 13 W R 371 (Civ)

Suit to recover the amount of dower

911

HUSSEIN KHAN SARDARKHAN v GULAB KHATUN

The plaintiff sued her husband (the defendant) to recover from him the sum of Rs 593 being the unpaid portion of the dower At the time the parties were married the amount of the dower was fixed at Rs 750, out of which the plaintiff received Rs 157 in the shape of ornaments The marriage register was silent as to whether the dower was prompt or deferred The defendant set up a custom that dower could not be demanded before divorce or death of the husband, but failed to prove it The defendant contended that the marriage had not been consummated, and that the plaintiff's suit for the recovery of her dower was, therefore, premature

The Subordinate Judge held that the whole of the dower was payable on demand, that there was no consummation but that the plaintiff was notwithstanding entitled to recover the unpaid dower This decree was on appeal confirmed by the lower appellate Court The defendant appealed to the High Court

Manubhai Nanabhai, for the appellant (defendant) —The lower Court has erred in presuming the whole amount of the dower to be prompt See *Fatma* v *Sadruddin*[1], *Muriam oon-nissa Begum* v *Imdadee Begum*[2], *Taufik un-nissa* v *Ghulam Kambar*[3], *Eidan* v *Mazhar Husain*[4], *Zakeri Begum* v *Sakina Begum*[5], Sircar's Mahomedan Law Vol I, p 351

The suit is premature, there having been no consummation of marriage See *Abdul Kadir* v *Salima*[6], MacNaghten Pr 20, case xxxi, A, 3, case xxxv Ameer Ali, Vol II, pp 363, 365, 484, 485 (3rd Edn), Abdur Rahman, Art 81, Baillie, pp 91, 96, 101

L A Shah, for the respondent (plaintiff) —The suit is not premature, for prompt dower can be demanded immediately after marriage See MacNaghten, Pr 7, *ib* 22, Wilson, sections 40, 41 (2nd Edn) The right is in no way dependent upon

(1) (1865) 2 Bom H C R 291
(2) (1848) 3 S D A (N W P) 185
(3) (1877) 1 All 506
(4) (1877) 1 All 483
(5) (1892) 19 Cal 689
(6) (1886) 8 All 149

B 790—2

1911

Hussein Khan Sardarkhan v. Gulab Khatum

consummation of marriages See *Abdul Kadir* v *Salima*[1], *Kunhi* v *Moidin*[2], *Hamidunnessa Bibi* v *Zohiruddin Sheik*[3], *Bai Hansa* v *Abdalla*[4] *Abdul* v *Hussenbi*[5]

Manubhai, in reply, cited MacNaghten, Pr 7, 22, 20, Baillie, pp 13, 91, 96, 101, Abdur Rahman, Arts 74, 81, Sircar, Vol I, pp 363, 484, Ameer Ali, Vol II, p 473 (3rd Edn), and *Hossetnooddeen* v *Tajunnissa*[6]

CHANDAVARKAR, J —Two points of law have been argued in this second appeal First, it is contended that the District Judge is wrong in holding the whole amount of the dower to be prompt and the decision of this Court in *Fatma* v *Sadruddin*[7] is relied upon by the appellant's pleader in support of the contention There it was held that, where no specific amount of dower had been declared exigible, and there was no evidence of what was customary, it was not an error in law for the Court of facts to hold one third only of the whole amount to be exigible during the life of the husband, the remaining two thirds being payable on his death The decision in question lays down no inelastic principle of law, but merely points out what, in the circumstances of the case, was an equitable rule to follow The learned Judge is therefore, right in holding upon the facts of the present case that the whole is exigible

Next it is urged that in the case of prompt dower, the right of the wife is dependent upon, and does not arise until after, consummation of the marriage According to Mahomedan law, marriage is a civil contract and dower is a necessary result of it, being a part of the consideration for her agreement to become her husband's wife by consummating the marriage *Masthan Sahib* v *Assan Bivi Ammal*[8] Consummation is not a consideration for the marriage contract but is performance of the contract Prompt dower (*muajjal*, as it is called) is payable immediately on the marriage taking place, and it must be paid on demand If it were payable on consummation, the authorities on Mahomedan

[1] (1886) 8 All. 149
[2] (1888) 11 Mad 327
[3] (1890) 17 Cal 670
[4] (1905) 30 Bom 122
[5] (1904) 6 Bom L. R. 723
[6] (1864) W R (Gap No) 130
[7] (1869) 2 Bom H C R 291
[8] (1900) 23 Mad 371

law would have said so instead of using the word "demand" And this is in accordance with *Kunhi v. Moidin*[1], where it is said — "The Muhammadan matrimonial contract involves separate and independent contracts by the husband and wife The wife is by contract bound to submit herself to her husband and he is bound to pay the prompt or other dower according to the contract, or if no sum agreed on, according to the provision of the law Each has a separate remedy against the other for non performance of the contract" In *Ranee Khejoorunissa v. Ranee Pyeesunissa*[2], it was held that, under Mahomedan law, it is only by payment of the prompt dower that the husband is entitled to consummate the marriage or enforce his conjugal rights and that "unless delay is stipulated for and agreed to, it should be paid at the time of the marriage" It follows that the right to restitution, so far from being a condition precedent to the payment of prompt dower, arises only after the dower has been paid

The decree must, therefore, be confirmed with costs

Decree confirmed

R R

(1) (1888) 11 Mad. 327 (2) (1870) 13 W R 371 (Civ)

APPELLATE CIVIL

Before Sir Basil Scott Kt, Chief Justice and Mr Justice Batchelor

KASHIBAI WIDOW OF GANESH (ORIGINAL OPPONENT 2) APPELLANT, v MORESHVAR RAGHUNATH A MINOR, BY HIS GUARDIAN MOTHER SITABAI (ORIGINAL PETITIONER) RESPONDENT * 1911 April 10

Hindu Law—Mitakshara—Inheritance—Paternal uncle's grandson—Paternal uncle's widow

Among Hindus in the Bombay Presidency governed by the law of the Mitakshara a paternal uncle's grandson is to be preferred as an heir to a paternal uncle's widow

* Appeal No 155 of 1910

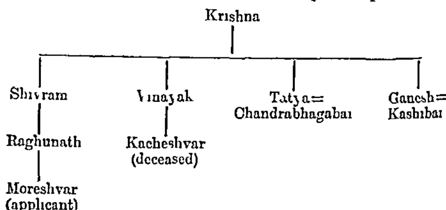
1911

KASHIBAI v MORESHVAR RAGHUNATH

APPEAL against the decision of K Barlee, Assistant Judge of Poona, in the matter of an application for Letters of Administration

Question of inheritance according to Hindu Law

The following table shows the relationship of the parties —



Kacheshvar died on the 27th October 1908 Thereupon the applicant Moreshvar a minor, represented by his certified guardian his mother Sitabai, applied for the Letters of Administration to the estate of the deceased The application was opposed by Chandrabhagabai and Kashibai claiming as widows of the *gotraja sapindas* of the deceased The Assistant Judge relying on the decision in *Rachava* v *Kalingapa*[1] passed an order granting Letters of Administration to the applicant on his furnishing security

Opponent 2 Kashibai appealed

J. R Gharpure for the appellant (opponent 2)

P D Bhide with *L B Petkar* for the respondent (applicant)

SCOTT, C J —The question which we have to decide is whether among Hindus in this presidency governed by the law of the Mitakshara a paternal uncle's widow or a paternal uncle's grandson is to be preferred as an heir for the purpose of grant of Letters of Administration That the paternal uncle's widow is a *gotraja sapinda* eligible for inheritance results from the decision in *Lallubhai Bapubhai* v *Mankuvarbai*[2], which was

(1) (1892) 16 Bom 716 (2) (1876) 2 Bom 388

affirmed by the Judicial Committee The question which now comes before the Court was anticipated by Mr Justice West in his judgment in that case in the following passage —

"The recognition of the widows of *gotraja sapindas* as themselves *gotraja sapindas* however slender the basis on which it originally rested so far as collaterals are concerned has become a part of the customary law wherever the doctrines of the Mitakshara prevail and the Courts must give effect to it accordingly Whether indeed the widow of a collateral should take before the son or grandson of the same man, may admit of question The mother of the *propositus* takes before her son or grandson and a like precedence is assigned to his grandmother and great grandmother but brothers wives, on the other hand are not mentioned between brothers and their sons in Yajnavalkya's text nor has Vijnyaneswara found a special place for them or for a descendant's widow as he has for the daughter's son Although therefore a woman, become a member of her husband's family takes the benefit of a rule resembling that of the Roman Law yet as in that law the widow's right of inheritance was limited and of late introduction the gradus applying in strictness only to blood relations, so analogy may be thought to lean somewhat to the preference of the eldest surviving male as representative of any branch to the widow of any collateral in the same line but the point cannot be finally decided until it arises in the proper form It is enough for the purposes of the present case to say that a widow in a nearer collateral line has precedence according to the Mitakshara, over a male in a remoter line" (pp 414 415)

In a subsequent passage he states that—

"If the foundation of the rights of widows of *gotrajas* under the Mitakshara is slender, under the Mayukha it may be called almost shadowy (p 417)

In *Rachava* v *Kalingapa*[1], the Court gave effect to the opinion thus expressed by West, J, by holding that a paternal uncle's son was to be preferred to the widow of another paternal uncle of the propositus Mr Justice Telang expressed the conclusion of the Court in these words —

When it is remembered that the widows of collaterals among the *gotrajas* are not specifically mentioned even in those works like the Mitakshara where collateral males like uncle's sons etc are expressly named it seems to be the fairer interpretation of the law to hold, that a female *gotraja sapinda* in any one line cannot exclude any male properly belonging to that line (p 720)

The question then is whether the paternal uncle's grandson can be said to be a male properly belonging to the line to which a paternal uncle's widow belongs within the meaning of that

(1) (1892) 16 Bom 716

1911

KASHIBAI v. MORESHVAR RAGHUNATH

judgment In dealing with the question of lines of descent Mr Justice Telang makes the following observations —

' In the Mitakshara Chapter II Sec 5, Pl 4—5, it is laid down that the propinquity of *gotrajas* is to be determined by lines of descent—that is to say, the inheritance is to go first in the line (the word in the original is *santana*, literally, 'continuation) of the paternal grandfather, then, in default of any one in that line, of the paternal great grandfather then of the paternal great great grandfather, and so forth Now ordinarily there can be no doubt that each of these lines must be treated as represented or "continued , by any male member belonging to that line in preference to any female As in an undivided family no female member of the family would be ordinarily regarded as re presenting the family while any male member was alive so it should be in the case of the lines to which the Mitakshara refers (p 719)

It has been laid down by the Judicial Committee that the line of *sapindas* includes descendants in the 6th degree *Bhyah Ram Singh* v *Bhyah Ugur Singh*(1) The respondent as uncle's grand son of the propositus is third in descent from the grandfather from whom the line of collaterals springs and therefore well within the line This is not disputed, but it is argued that the lines of collaterals are, according to the better opinion interrupted after the second in descent from the ancestor from whom they spring and that the third in descent is postponed both to the first and second in descent in more remote collateral lines and also to the last four in descent in all earlier collateral lines The argument is supported by reference to *Suraya* v *Lakshminara samma*(2), and to the article on *sapinda* relationship in Appendix III of Mandlik s Hindu Law The views expressed in these authorities have by no means obtained universal acceptance, the arguments in favour of an uninterrupted line of six descend ant *gotraja sapindas* from each of six male ancestors are to be found in West and Buhler's Hindu Law (3rd Edn pp 114—123) and *Kalian Rai* v *Ram Chandar*(3) We do not think it necessary in this case to discuss the arguments on either side in connection with this difficult question as the decisions of this Court to which reference has been made would not in our opinion justify the preference of the widow of a *gotraja-sapinda* to any male *sapinda*

(1) (1870) 13 Moo I A 373 at p 391 (2) (1882) 5 Mad. 291
(3) (1901) 24 All 125

within the six degrees of the same line for the purpose of inheritance among collaterals 1911

KASHIBAI v MORESHVAR RAGHUNATH

The grandson of the uncle is, therefore, to be preferred to the widows of other uncles of the propositus

We affirm the order of the lower Court The parties may have their costs out of the estate

Decree affirmed
G B R

APPELLATE CIVIL

Before Sir Basil Scott Kt Chief Justice and Mr Justice Batchelor

LAKHMICHAND JEWACHAND (ORIGINAL PETITIONER) APPELLANT v KACHUBHAI GULABCHAND AND OTHERS (ORIGINAL OPPONENTS) RESPONDENTS * 1911 *April* 10

Civil Procedure Code (Act V of 1908) Order I Rule 10—Limitation Act (IX of 1908) Article 171—Partition suit—Death of a party—Abatement—Application to set aside the abatement—Limitation of sixty days—In a partition suit all parties should be before the Court—Inherent power of the Court to add a party at any stage of the suit for the ends of justice

On the 5th April 1892 the plaintiff obtained a decree for partition and died in October 1893 leaving him surviving a minor son, who attained majority in February 1907 At a very late stage of the execution proceedings, the son made an application on the 16th April 1910 for the issue of a commission to effect partition according to the rights declared in the partition decree

Held that as soon as the Civil Procedure Code (Act V of 1908) came into force the suit abated so far as regarded the applicant's father who was a party and the application to set aside the abatement by adding the applicant as the legal representative of the deceased not having been made within sixty days under Article 171 of the Limitation Act (IX of 1908) the application was time barred

Held further, that in a partition suit all the parties should be before the Court, and that there was nothing in the Civil Procedure Code (Act V of 1908) limiting or affecting the inherent power of the Court to make such orders as might be necessary for the ends of justice

* Appeal No 51 of 1910 from order

1911

LAKHMICHAND REWACHAND v. KACHUBHAI GULABCHAND

APPEAL from an order passed by D G Medhekar, First Class Subordinate Judge of Poona, in the matter of an application for execution of a decree for partition

In a partition suit, No 90 of 1891, between one Rewachand Gujar as plaintiff and (1) Kachubhai Gulabchand, (2) Nyhalchand Shirchand, (3) Sarupchand Shirchand, and (4) Harakchand Dipchand as defendants, the Court passed a decree, dated the 5th April 1892 The plaintiff died in October 1893 leaving him surviving a minor son Lakhmichand, who attained majority on the 7th February 1907 On the 13th April 1908 Lakhmichand made an application for commission to effect partition of non revenue paying immoveable property under section 396 of the old Civil Procedure Code (Act XIV of 1882), but the Court, on the 28th November 1908, held the application to be time-barred and rejected it under section 368 of the same Code The applicant, thereupon, appealed to the High Court and in the appeal he withdrew the application

Subsequently Lakhmichand on the 16th April 1910, preferred an application under Order 26, Rule 13 of the Civil Procedure Code (Act V of 1908) for the issue of a commission to make a partition according to the rights declared in the partition decree The defendants opposed the application on the ground, among others, that it was not tenable inasmuch as it was not made within the time allowed by law for the substitution of the applicant's name as required by section 368 of the Civil Procedure Code (Act XIV of 1882)

The First Class Subordinate Judge rejected the application on the grounds that the suit had abated long before the presentation of the application, that it was not proved that the applicant was prevented by sufficient cause from continuing the suit, and that the application did not contain any prayer for setting aside the order of abatement

The applicant preferred an appeal

S R Bakhle for the appellant (applicant)

G K Dandekar for respondent 1 (opponent 1)

SCOTT, C J —We think that the suit abated as soon as the Civil Procedure Code of 1908 came into force so far as regarded

the applicant's father who was a party, and the application to set aside the abatement by adding the applicant as the legal representative, not having been made within sixty days, is barred by Article 171 of the Limitation Act of 1908 It is obvious, however, that in a partition suit all the parties should be before the Court The suit has actually reached the stage of a commission to divide the property, and the applicant is a sharer Nothing in the Code limits or affects the inherent power of the Court to make such orders as may be necessary for the ends of justice, and under Order I, Rule 10, the Court may, at any stage of the proceedings, order that the name of any person whose presence may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added We, therefore, order that the applicant be added as a defendant in the suit, being bound by all the proceedings up to date

1911

LAKHMI CHAND REWACHAND v. KACHUBHAI GULABCHAND

Costs costs in the cause

Order set aside

G B R

APPELLATE CIVIL

Before Mr Justice Chandavarkar and Mr Justice Heaton

SUBRAYA BIN VENKATESH BUDDA SHETTI AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS *v* GANPA *alias* GOVIND NARAYAN NAIK AND OTHERS (ORIGINAL DEFENDANTS) RESPONDENTS *

1911 *April* 11

Mortgage—Mortgagee failing to pay a part of consideration as provided in the mortgage deed—Failure of consideration—Subsequent payment cannot be taken as part of mortgage debt—Transfer of Property Act (IV of 1882) sections 56 81 88—Marshalling of securities

In 1896, G mortgaged some lands (Serial Nos 1—10) to V for Rs 400 of which Rs 200 were paid in cash and Rs 200 were to be paid to N a prior mortgagee V having failed to pay to N G sold to defendant No 5 some of the lands mortgaged (Serial Nos 6—10) and other property and redeemed N s mortgage by paying Rs. 200 to him. Subsequently V paid Rs 200 to G

* Second Appeal No 797 of 1907

1911

SUBBAYA BIN VENKATESH v. GANPA

Shortly afterwards G mortgaged some more lands (Serial Nos 1, 3, 4 and 5) to defendant No 4 for Rs 400 The defendant No 4 sued on his mortgage and obtained a decree against G In execution of the decree the lands Serial Nos 1, 3 4 5 were sold and were purchased by defendant No 4 V then sued on his mortgage treating it as one for Rs 400, to recover the amount by sale of all the ten numbers The lower Courts recognized V's mortgage only for Rs 200 and granted him a decree authorizing him to proceed against Serial No 2 alone and if the sale proceeds failed to satisfy his claim, to proceed against the other serial numbers which were sold to defendants Nos 4 and 5 On appeal —

Held that V was not entitled to treat his mortgage as one for Rs 400, since V having failed to pay Rs 200 to N either at once or within a reasonable time there was partial failure of consideration for the mortgage and the subsequent payment of Rs 200 to G by V could not serve in law to undo the effect of that failure so as to prejudice the rights of defendant No 5

Held, further that the Court had power under section 88 of the Transfer of Property Act (IV of 1882) to pass in such a suit a decree for sale ordering that, in default of G paying the mortgaged property or a sufficient part thereof be sold

Per Curiam —The provisions of section 56 of the Transfer of Property Act, 1882 apply only as between a seller and his buyer, not as between a mortgagee of the seller and the buyer

SECOND appeal from the decision of C C Boyd, District Judge of Kanara, confirming the decree passed by K R Natu, Subordinate Judge at Kumta

Suit on mortgage

On the 3rd January 1896, Ganpa (defendant No 1), as manager of a joint Hindu family consisting of himself and his two brothers, defendants Nos 2 and 3, mortgaged lands (Serial Nos 1—10) to Venkatesh Shetti (father of plaintiffs) for Rs 400 Rs 200 were paid in cash at the time and the remainder was covenanted to be paid to Nagappa, a prior mortgagee Venkatesh failed to make the payment On the 10th July 1897, Ganpa sold some of the lands (Serial Nos. 6—10) and other property to Rango (defendant No 5) for Rs 300, and out of the money redeemed Nagappa's mortgage On the 15th March 1898, Venkatesh paid Rs 200 to Ganpa On the 30th March 1898, Ganpa mortgaged four more lands (Serial Nos 1, 3, 4 and 5) with Shivram (defendant No 4) In 190?,

Shivram sued on his mortgage and obtained a decree In execution of the decree, the lands Serial Nos 1, 3, 4 and 5 were sold and purchased by Shivram himself

In 1904, the plaintiffs sued to recover their money (Rs 400) by sale of the mortgaged property The Subordinate Judge held that as the plaintiffs had paid Rs 200 under the mortgage, the mortgage held good to that amount only, and that the subsequent payment of Rs 200 which they made to Ganpa was no part of consideration for the mortgage and applying section 56 of the Transfer of Property Act, 1882, he ordered that on failure by Ganpa to pay the mortgage amount within six months of the date of the decree, the plaintiffs should first put up to sale land, Serial No 2, and if there was any deficiency after that sale, the other land Serial Nos 1 and 3—10 should be sold

On appeal, the District Judge confirmed the decree, but placed reliance on section 81 and not on section 56 of the Transfer of Property Act of 1882, in support of the order of sale

The plaintiffs appealed to the High Court

Nilkant Atmaram, for the appellants —I submit we are entitled to a decree for the full mortgage amount, *i e*, Rs 400 The money that were payable to Nagappa was eventually paid to defendant No 1, who had in the meanwhile made the payment himself By accepting payment from plaintiff, the defendant No 1 allowed the mortgage charge to be valid to the extent of Rs 400 In any view of the case the defendant No 4 should not be allowed any priority in virtue of his mortgage Further the lower Courts have erred in restricting the plaintiffs' right to Serial No 2 in the first instance The Court of first instance has erred in applying section 56 of the Transfer of Property Act 1882, and the lower Court has mistakenly relied on section 81 of the Act, in making the order See *Indukuri Rama Raju* v *Yerramilli Subbarayudu*[1], *Lala Dilawar Sahai* v *Dewan Bolakiram*[2] and *Bhikhari Das* v *Dalip Singh*[3] See also *Kishun Pershad Chowdhry* v *Tipan Pershad Singh*[4]

(1) (188?) 5 Mad 387
(2) (1885) 11 Cal 258
(3) (1895) 17 All. 434.
(4) (190?) 34 Cal 735

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SUBRAYA BIN VENKATESH v. GANPA

P M Vinekar, for the respondent, referred to *Webb* v *Smith*[1], *Tidd* v *Lister*[2] and *Gibson* v *Seagrim*[3]

CHANDAVARKAR, J —It is necessary to state at the outset the facts found by the lower Court of appeal, so far as they are material for the purposes of the two questions of law argued before us

The facts are briefly these

On the 3rd of January 1896, defendant No 1, as manager of the undivided Hindu family consisting of himself and defendants Nos 2 and 3, mortgaged by a registered deed (Exhibit 42) ten lands to one Venkatesh Shetti, deceased, represented in this litigation by the plaintiffs, for a debt due from the family The consideration for the mortgage was Rs 400, of which Rs 200 were paid at the time of its execution to the mortgagor, as to the balance the mortgagee covenanted by the mortgage-deed to pay it to one Nagappa, a previous mortgagee of defendant No 1's family

Venkatesh Shetti, the mortgagee, having failed to pay to Nagappa defendant No 1 sold to defendant No 5, on the 10th of July 1897 some of the lands mortgaged under Exhibit 42 and other property not covered by that deed, and by means of the proceeds of the sale defendant No 1 through defendant No 5 redeemed the mortgage to Nagappa

On the 15th of March 1898, Venkatesh Shetti, the mortgagee under Exhibit 42, paid to defendant No 1 Rs 200

On the 30th of March 1898, defendant No 1 mortgaged under a registered deed (Exhibit 60) to defendant No 4 for Rs 500 four only out of the ten lands covered by plaintiff's mortgage, Exhibit 42

In 1902, defendant No 4 sued defendant No 1 on his mortgage, and, in execution of the decree for sale obtained therein, became purchaser through Court of the four lands covered by his mortgage, Exhibit 60

The result was this Plaintiffs were mortgagees of defendant No 1 for Rs 400 under Exhibit 42, but they did not, as agreed,

(1) (1885) 30 Ch D 192 at p 200
(2) (1852) 10 Hare 140
(3) (1855) 20 Beav 614

pay Rs 200 out of that amount to defendant No 1's previous mortgagee, Nagappa, until after defendant No 1 had sold some of the mortgaged lands to defendant No 5 and satisfied Nagappa's mortgage Defendant No 4, a mortgagee subsequent of some other lands mortgaged under Exhibit 42, became Court purchaser of those lands in execution of a decree on his mortgage

Plaintiffs now sue to recover on their mortgage, Exhibit 42 Both the lower Courts have given them a decree treating their mortgage as one for Rs 200 only, instead of Rs 400, further, the Courts have directed by the decree that in the event of defendants Nos 1 to 3 failing to pay the amount found due on the mortgage, plaintiffs should first proceed against that portion of the mortgaged property which is in the hands of those defendants and bring to sale the properties sold respectively to defendants Nos 5 and 4, only in case the decree is not satisfied by a sale of the former

Plaintiffs impugn on this second appeal the correctness [illegible] of both these restrictions on their right under their mortgage, Exhibit 42

First, it is contended for them that as they paid the [illegible] Rs 200 to defendant No 1, they are entitled to [illegible] the mortgage, Exhibit 42, as one for the full consideration of Rs. [illegible] finding of the Court below disposes of that contention [illegible] to that finding, the mortgagee had kept the amount [illegible] for payment to Nagappa He was bound to pay [illegible] the latter either at once or within a reasonable [illegible] tract to pay He did not perform the contract and [illegible] was in consequence compelled to sell some of the mortgaged lands to defendant No 5 and to satisfy Nagappa's [illegible] of the sale proceeds There was, therefore, partial [illegible] tion for the mortgage, Exhibit 42, and the subse[illegible] payment of Rs 200 to defendant No 1 by the plaintiff [illegible] law to undo the effect of that failure, so as to [illegible] the rights of defendant No 5 Those rights are as of the day on which the sale to him took place The plaintiffs' contention, that the subsequent payment of Rs. 200 must be treated as [illegible] advance made under Exhibit 42 so as to entitle him to [illegible] the amount to

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SUBBAYA BIN VENKATESH v. GANPA

the sum of Rs 200 paid according to its terms on the date of its execution, ignores the fact that there was no contract for any future advance in that deed Nor can the plaintiffs hold defendant No 1 personally liable for the sum of Rs 200, the personal liability having become barred by limitation

The next question is whether the lower Courts have rightly decreed that, in the event of defendants Nos 1 to 3's failure to pay the decretal amount found due upon the mortgage, Exhibit 42, the plaintiffs should first proceed by way of sale against that portion of the mortgaged property which is in the hands of the former, and that they should proceed against the property purchased through Court by defendant No 4, in case the proceeds of that sale are not sufficient to extinguish the decretal debt The Subordinate Judge relied on section 56 of the Transfer of Property Act in support of this portion of the decree That section applies only as between a seller and his buyer, not as between a mortgagee of the seller and the buyer The District Judge relies on section 81

Defendant No. 4 is now, no doubt, a purchaser at a Court sale of some of the lands mortgaged under Exhibit 42 But before his purchase he had been a puisne mortgagee under Exhibit 60, and the doctrine of law is that a mortgagee, who purchases mortgaged property in execution of his decree for sale on his mortgage, becomes a purchaser by estoppel, that is to say, he purchases the interests of both the mortgagor and the mortgagee *Khemraj Jasrup v Lingaya*(1) Defendant No 4 is, therefore, entitled to say that he must be treated as a puisne mortgagee for the purposes of plaintiffs' mortgage, and that he must be allowed the benefit of section 81 of the Transfer of Property Act

But then that section requires that the puisne mortgagee should have had no notice of the former mortgage Here it is found by the Courts below that defendant No 4 had notice Section 81, therefore cannot avail him

Though the decree of the Court below cannot be supported on the ground of either of the sections mentioned the Court has

(1) (1873) 5 Bom 2 at p. 5

power, under section 88 of the Transfer of Property Act, to pass in such a suit a decree for sale, ordering that, in default of the defendant paying as directed by the decree, the mortgaged property or a sufficient part thereof be sold The lower Court's decree, directing the sale of the portion of the mortgaged property which is in the hands of the mortgagors (respondents Nos 1 to 3) first, before the appellants can proceed against the property in the hands either of respondent No 4 or respondent No 5, must be upheld as being in substantial compliance with section 88, unless the appellants are able to satisfy the Court that the direction in question has prejudiced or is likely to prejudice their rights *Appayya v Rangayya*[1] No such complaint having been made in the lower Court of appeal, it should not be allowed in second appeal On these grounds the decree must be confirmed with costs

Decree confirmed

R R

(1) (1908) 31 Mad 419 at p 423

CRIMINAL REVISION

Before Mr Justice Chandavarkar and Mr Justice Heaton

IN RE BABA YESHWANT DESAI*

1911
April 11

Criminal Procedure Code (Act V of 1898) sections 119, 200, 437—Security for good behaviour—Discharge by Magistrate—District Magistrate ordering fresh inquiry—Accused—Discharge—Interpretation

A District Magistrate can under section 437 of the Criminal Procedure Code 1898 order fresh inquiry into the case of a person "discharged" by a Subordinate Magistrate under section 119 of the Code

The phrase "any accused person" as used in section 437 is not confined in its application to a person against whom a complaint has been made under section 200 of the Code It includes a person proceeded against under Chapter VIII of the Code

The term "discharged" is not defined in the Code and there is no valid ground for departing in respect of it from the rule of construction that where

* Criminal Application for Revision No 53 of 1911.

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BABA YESHWANT DESAI In re

in a Statute the same word is used in different sections it ought to be interpreted in the same sense throughout unless the context in any particular section plainly requires that it should be understood in a different sense

Queen Empress v *Mutasaddi Lal*[1], *King Emperor* v *Fyaz ud din*[2] and *Queen Empress* v *Mona Puna*[3], followed

Queen Empress v *Iman Mondal*[4] and *Velu Tayi Ammal* v *Chidambaravelu Pillai*[5] not followed

THIS was an application to revise an order passed by J Brander, District Magistrate of Ratnagiri

The applicant was asked to furnish security for good behaviour under Chapter VIII of the Criminal Procedure Code The trying Magistrate heard witnesses examined by the prosecution and defence, and discharged the applicant

On an application having been made to him, the District Magistrate, acting under section 437 of the Criminal Procedure Code, set aside the order of discharge and directed a fresh inquiry against the applicant to be held before another Magistrate

The applicant applied to the High Court

B V Desai for the applicant

G S Rao, Government Pleader, for the Crown

The following cases were referred to —*Muhammad Khan* v *King-Emperor*[6], *Queen Empress* v *Iman Mondal*[4], *Velu Tayi Ammal* v *Chidambaravelu Pillai*[5], *Queen Empress* v *Mona Puna*[3], *Queen Empress* v *Mutasaddi Lal*[1], and *King Emperor* v *Fyaz ud din*[2]

CHANDAVARKAR, J —The question before us is whether the District Magistrate has jurisdiction under section 437 of the Code of Criminal Procedure to order a fresh inquiry into the case of a person "discharged" by a Subordinate Magistrate under section 119 of the Code The decision of the question turns upon the interpretation of the words "any accused person" and "discharged" used in section 437 There is no definition of "accused person" in the Code, and we see no sound reason for

(1) (1898) 21 All. 107
(2) (1901) 24 All 148
(3) (1892) 16 Bom. 661
(4) (1900) 27 Cal 662
(5) (1909) 33 Mad. 85
(6) (1903) P. R. No 12 of 1903 (Cr.).

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BABA YESHWANT DESAI *In re*

confining its application to a person against whom "a complaint" has been made under section 200 of the Code Persons proceeded against under Chapter VIII of the Code are persons against whom there is an accusation in the ordinary acceptation of the word The word "discharged" is also not defined in the Code, and there is no valid ground for departing in respect of it from the rule of construction that, where in a Statute the same word is used in different sections, it ought to be interpreted in the same sense throughout, unless the context in any particular section plainly requires that it should be understood in a different sense We think that we should follow the rulings of the Allahabad High Court *Queen-Empress* v *Mutasaddi Lal*[1] and *King-Emperor* v *Iyaz ud din*[2], which follow the decision of this Court in *Queen Empress* v *Mona Puna*[3], and not the rulings in *Queen Empress* v *Iman Mondal*[4] and *Velu Tayi Ammal* v *Chidambaravelu Pillai*[5] The rule is accordingly discharged

Rule discharged

R R

(1) (18 8) 21 All 107

(2) (1901) 24 All 148

(3) (1892) 16 Bom 661

(4) (1900) 27 Cal 662

(5) (1900) 33 Mad 85

APPELLATE CIVIL

Before Mr Justice Chandavarkar and Mr Justice Heaton

BAI MAHAKORE AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS v BAI MANGLA AND OTHERS (ORIGINAL PLAINTIFFS) RESPONDENTS *

1911 *April* 12

Deposit—Husband depositing money in wife's name in his shop—Interest allowed over the amount—Depositee allowed to withdraw—Husband acknowledging trust—Creation of trust—Trusts Act (II of 1882) sections 5 and 6—Transfer of Property Act (IV of 1882) sections 5, 54

D made a credit entry of Rs 20 000 in his books in the name of his wife H carrying interest at 4½ per cent The entry was made on the 1st November 1891 as of the 30th November 1890 The amount of Rs 20 000 was treated as belonging to H in the *Sarvaya* (balance sheet) in the *Samadaskat* book

* First Appeal No 283 of 1908

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Bai Mahakore v. Bai Mangla

(account book of deposits, &c) and in the *Vyajavahi* (interest account book) In November 1895 H on the occasion of her going on pilgrimage withdrew some money from the account H died on the 2nd March 1901 On the 29th July 1901 D wrote a letter to his four daughters by H saying that the money above referred to was given by him to H as a gift that the four daughters had equal right to take the money, but that it was to be divided after his death. In February 1903 D debited the whole amount to H s account and credited the same to the sons of M, one of the daughters of D and H This he confirmed by his will which he made shortly afterwards wherein he stated that the money was always his own and never belonged to his wife H After D's death, which took place in March of the same year the three remaining daughters of D and H sued to recover their share of the money —

Held, that the plaintiffs were entitled to recover their share in the amount

Held by CHANDAVARKAR, J that the circumstances proved showed that D intended a trust in favour of his wife H, and that that trust was carried into effect legally by him

Held, by HEATON J, that there was no trust but that in the circumstances of the case, D conferred on H a right to the money though he did not actually give her money, and this right he by his own acts and words made perfect by those means which were appropriate to the purpose

APPEAL from the decision of Vadilal Tarachand Parekh, First Class Subordinate Judge at Broach

Suit to recover a sum of money

One Damodardas had a wife Harkore by whom he had four daughters Mangla, Kashi and Dhankore (plaintiffs) and Mahakore (defendant No 1) Mahakore had three sons Dhiraj lal, Pranlal and Ratilal (defendants Nos 3 to 5)

On the 1st November 1891 Damodardas made a credit entry of Rs 20,000 in his account books in the name of Harkore The entry was made as of the 30th November 1890 and interest was calculated at the rate of 4½ per cent This amount together with the accumulated interest was shown in Harkore's name in the *Samadaskal* book (*i e*, book showing the deposits &c) in the *Vyajavahi* (interest account) and in the *Sarrayas* (annual balance sheets) In November 1895, when Harkore went on pilgrimage, she withdrew from the account a sum of Rs 150 odd, and she further withdrew in small sums another amount of Rs 359 from the same account Harkore died on the 2nd March 1901

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BAI MAHAKORE v. BAI MANGLA

Some time after Harkore's death, Damodardas started on pilgrimage On that occasion he wrote a letter to his four daughters, which ran as follows —

(To) Ben Mangla and Mahakore and Keshi and Dhankore written by Shah Damodardas Tulsidas To wit You are my daughters and your mother Bai Harkore is dead There are her ornaments worth about (Rupees) five (or) six thousand As to the said (ornaments) and as to the money (which has been) given by me as a gift to your mother Bai Harkore (and) which is placed to (her) credit in my Sarafi (i e, money lending) shop—you all the four sisters have equal right to take the said money and ornaments After my death you should take (the money) and should divide and take the ornaments or as stated by me in the will (you) should keep the same (i e, ornaments) as joint (property) and wear them on necessary occasions and as to the money whatever the same may come to with interest, you all the four sisters should divide the same into shares and keep (the respective share) credited in the shop in the name of each or should divide and take the same I am going on pilgrimage and hence I have written this note You should act in accordance with what is written therein (herein) This is all

Thereafter Damodardas changed his mind In February 1903, he debited the Rs 20 000 and interest (Rs 31,710) to the name of Harkore and credited it to the names of the three sons of Mahakore And in his last will which he made about that time he referred to this change of entries, and stated that the money never belonged to his wife, but was all along his own Damodardas died on the 23rd March 1903

On the 5th March 1904, the three daughters of Damodardas and Harkore filed this suit to recover their share in the amount aforesaid, treating it as belonging to Harkore The claim was resisted by the fourth daughter Mahakore and her three sons, who contended that the money ever belonged to Damodardas who had gifted it away to the sons

The Subordinate Judge held that Damodardas had made a gift of the money to Harkore and that the plaintiffs were entitled to recover their share in the same

The defendants appealed to the High Court

Raikes, with *G S Rao*, for the appellants

Strangman (Advocate General), with *L A Shah*, for the respondents

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BAI MAHAKORE v. BAI MANGLA

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Fat Mahakore v. Bai Mangla

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The Subordinate Judge held that Damodardas had made a gift of the money to Harkore and that the plaintiffs were entitled to recover their share in the same

The defendants appealed to the High Court

Raikes, with *G S Rao*, for the appellants

Strangman (Advocate General), with *L A Shah*, for the respondents

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BAI MAHAKORE v. BAI MANGLA.

CHANDAVARKAR, J —The facts which are admitted are shortly these On the 1st of November 1891, the deceased Damodardas made a credit entry of Rs 20,000 in his books in the name of his wife, Harkore, carrying interest at $4\frac{1}{2}$ per cent The entry was made as of the 30th of November 1890 He also treated the amount of the entry as belonging to his wife in his annual balance sheet showing his assets and liabilities, in his *Samadaskat* book, and in his *Vyajavahi* which contained his interest account, and in which interest was calculated on the amount at varying rates In November 1895, Harkore went on pilgrimage and from the entries in Damodardas s books it appears that before going she had withdrawn Rs 150 odd from her account Harkore died on the 2nd of March 1901 On the 7th of February 1903, Damodardas debited Rs 15,000 to her account and credited the same amount to the three sons of his daughter, Mahakore On the 23rd of February 1903 he made a will, in which he stated that the amount was his own and had never belonged to his wife

These facts standing by themselves may be insufficient to show that Damodardas intended to create a trust in respect of Rs 20 000 in favour of his wife, and that he had constituted himself her trustee as to that amount But the respondents rely on a document (Exhibit 147), purporting to be a declaration of the trust and written to his daughters by him six months after the death of his wife, Harkore The genuineness of the document has been questioned for the appellants, but I see no reason whatever to doubt it The signature on it purporting to be that of Damodardas is admitted as his What is alleged is that, before going on pilgrimage, he had left a number of blank papers signed by him with one of his sons in law, but of this there is no satisfactory proof Were that true, the appellants should have found no difficulty in producing a few such blank papers or adducing credible evidence in support of their allegation It is true that the document in question was passed on the very next day after Damodardas had asked his pleader Mr Ambashankar, whether he could dispose of the money in his wife's name, and the pleader had told him that "he had no authority to do so as he was not the heir of his wife" But

I can see no improbability in the fact of Damodardas acknowledging the trust in favour of his wife to his daughters His pleader the day before had pointed out to him that they were the heirs entitled to the amount standing in his wife's name and it is not strange, rather it is very probable, that, acting on the pleader's opinion, he made the declaration The time when it was made is important Damodardas was about to go on a pilgrimage Naturally he would be anxious to settle all his affairs, and make definite arrangements about his property and his wife's It is usual with Hindus proceeding on pilgrimage to do that

If the document Exhibit 447, is proved, as I hold it is, there can be no question that Damodardas intended a trust in favour of his wife The only question, then, is whether that trust was carried into effect legally by him It is contended for the appellants it was not, because (it is urged) Damodardas did not comply with the requirements of section 5 of the Trusts Act, the second clause of which provides that 'no trust in relation to trust property is valid unless declared as aforesaid" (*i e*, as in the first clause), ' or unless the ownership of the property is transferred to the trustee" According to the contention, there must be either "a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered", or a transfer of the property to the trustee In this case there was neither

Section 5 of the Trusts Act must be read with section 6 Section 5 lays down what may be called the extrinsic conditions necessary to create a trust In other words, it prescribes the mode of its creation Section 6 lays down the intrinsic conditions necessary for a valid trust, in other words, given an instrument in writing or transfer of the kind mentioned in section 5, it prescribes what is necessary to make out a trust from the words used in the instrument or the act denoting the transfer The question must naturally have occurred, I presume, to the draftsman of the sections in this way Section 5 prescribes transfer as one of the two alternative modes for creating a trust of moveable property But the word *transfer*, as defined in the Transfer of Property Act (section 5), excludes the conveyance or delivery of property by a man to himself When

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a man creates a trust and constitutes himself its trustee, there can be no transfer Hence, I apprehend, the exception was made in section 6 that in such a case there need be no transfer Section 5, clause 2, lays down a general rule, section 6 creates an exception in the case of a trust of moveable property

But it is argued that this construction is inconsistent with the plain language of section 6, which requires that it should be read "subject to the provisions of section 5" I do not see the inconsistency Section 5, clause 2, requires transfer for a valid trust of moveable property, where it is not created by a non testamentary instrument of the kind mentioned in the first clause, and section 6 virtually declares that where a person is himself the author of a trust, there is a transfer, if the other conditions prescribed in section 6 are complied with

Then it is said that, in that case, upon this construction of section 6, a transfer is necessary for a valid trust of immoveable property except where the trust is created by a person of his own property and he is himself the trustee, but section 5 requires nothing of that kind in the case of such a trust Here, again, I fail to perceive any contradiction between the two sections on the construction above stated "Transfer of property" as defined in section 5 of the Transfer of Property Act, "means an act by which a living person conveys property", and seeing that by section 54 of the Act, the Legislature has made it plain in the case of a sale that a transfer of immoveable property can be made by a registered instrument the intention of the Legislature appears to me clear that in the case of a trust of immoveable property, such an instrument would operate as a transfer When sections 5 and 6 of the Trusts Act are read, as they should be read, by the light of the relevant provisions of the Transfer of Property Act, I venture to think that the words of section 6 of the former Act, which have given rise to difficulty of construction, must be construed as meaning that, though as a rule transfer is one of the conditions necessary for a valid trust, whether in the case of moveable or immoveable property no transfer is required where the trust is declared by a will or where the author of the trust is himself to be the trustee, and

that one of the modes of transfer is a non testamentary instrument in writing which is registered

For these reasons I am of opinion that in this case there was a valid trust in favour of Harkore As to the ornaments it is admitted that, if the document Exhibit 447 is held proved, the respondents are entitled to them

The decree is confirmed with costs

HEATON, J —The plaintiffs sue as some of the heirs of one Harkore kom Damodardas Tulsidas to recover a three-fourths share of her property Assuming that she left property of her own, the plaintiffs are entitled to three fourths of it This is not denied

The property alleged to be Harkore's comprises a sum of money and certain ornaments Her husband was a trader and in certain respects a banker also, as clients sometimes deposited money with him In such cases he showed these deposits in his accounts and in his annual balance sheets and sometimes he had a *Samadaslat*, a kind of pass book, made out in the depositor's name In November 1891 Damodardas caused the sum of Rs 20 000 to be entered in his business accounts in the name of his wife as if she had deposited that sum with him Thereafter up to the time of Harkore's death and for some time afterwards, that sum with accumulated interest, appeared in the accounts and the balance sheets exactly as if Harkore had been a depositor with Damodardas This is the sum of money three-fourths of which the plaintiffs claim Defendants denied that either the money or ornaments were Harkore's The First Class Subordinate Judge, who heard the suit, decided all the main points in favour of plaintiffs, holding that both the money and ornaments were Harkore's He decreed the claim Defendants have appealed

The facts are fully stated in the judgment of the lower Court I concur with his conclusions as to the facts in dispute The difficulty arises in connection with the inferences to be drawn from those facts

I will first deal with the ornaments The determination whether they were or were not Harkore's depends largely on

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the genuineness or falsity of an alleged signed and attested declaration purporting to be made by Damodardas on the 28th July 1901 (Exhibit 447) This was some months after Harkore had died and the day after he added a codicil to his original will, made in 1900 some months before his wife Harkore died At this time, July 1901, no disputes had arisen We have heard all that has to be said against this signed declaration and hold it to be genuine Admittedly it bears Damodardas's real signature and we cannot discern any indications, extrinsic or intrinsic, in appearance or matter or circumstances which with any degree of clearness or probability point to fabrication I think the Subordinate Judge has satisfactorily disposed of what is alleged against it In this declaration it is admitted that Harkore had ornaments That being so the number and identity of those ornaments are not disputed and to that extent the decree of the lower Court must be affirmed

The same declaration speaks of "the money given by me as a gift to your mother Bai Harkore and which is placed to credit in my money lending shop" This is of some importance as confirming the account entries and showing that Damodardas consistently regarded that money (the Rs 20,000) as his wife's

A *Samadaslat* book was produced relating to it which the defendants allege is also fabricated It is unnecessary to say more than that the Subordinate Judge has given good reasons for holding it to be genuine and that after a scrutiny of the evidence and hearing the arguments we agree with him

The Subordinate Judge held that the money had become Harkore's in virtue of a gift It was at one time contended that she had herself deposited the money, but that was not proved and has not been urged in appeal The facts are simply that Damodardas credited Rs 20,000 to his wife and thereafter treated her as a depositor for that amount This does not indicate a gift of money if a gift at all it is a gift of a right to money The money remained a part of the capital of the shop It was as much Damodardas's after the credit entry as before Money deposited in a bank becomes the property of the bank and ceases to be the property of the depositor The

latter becomes a creditor and the Bank is a debtor So here, Damodardas became a debtor and Harkore a creditor There was no gift of money nor is it argued in appeal that there was such a gift Therefore the conclusions of the lower Court as to the money cannot be supported on precisely the grounds taken by the First Class Subordinate Judge

But it is argued on behalf of the plaintiffs, respondents in appeal, that there was a trust To see whether this is so we have to look to sections 5 and 6 of the Indian Trusts Act According to section 5 no non testamentary trust in relation to moveable property is valid unless declared by a registered document or unless the ownership of the property is transferred to the trustee Here there is not a registered document and there was, I think, no transfer of ownership The property, the money, was and remained in the ownership of Damodardas

If we turn to section 6 we find that "a trust is created when the author of the trust indicates with reasonable certainty by any words or acts an intention on his part to create thereby a trust, etc" In this case I do not think the author of the alleged trust, Damodardas indicated an intention to create a trust It seems to me he indicated an intention to treat Harkore as a depositor and nothing more The proved facts appear to me precisely to fit this conception of the case and to be irreconcileable with any other A depositee is not a trustee for the depositor in respect of the deposit and the position here is that of depositor and depositee and nothing more Therefore I think there was not a trust

Nevertheless Damodardas was a debtor and Harkore a creditor The evidence to my mind conclusively proves that Damodardas intended her to have the rights of a depositor and never wavered from that intention until disputes arose some time after Harkore's death Long before that time the positions of depositor and depositee were established and confirmed by the continued and unvarying treatment of Harkore as a depositor, by the regular addition of interest to her deposit amount, and by the debiting to that amount of money spent on the expenses of Harkore's pilgrimage It had become too late for Damodardas

1911

BAI MAHAKORE v BAI MANGLA

by any act of his to annul the relations of depositor and depositee Therefore I think the Subordinate Judge was substantially right in his conclusions, though he referred to the matter as a gift Damodardas conferred on Harkore a right to the money though he did not actually give her money This right he by his own acts and words made perfect by those means which in the circumstances were appropriate to the purpose

Therefore I would confirm the decree of the lower Court with costs

Decree confirmed

R R

CRIMINAL APPELLATE

Before Sir Basil Scott Kt Chief Justice on reference from Mr Justice Chandavarkar and Mr Justice Heaton

1911

April 19

EMPEROR v B H DESOUZA.*

Bombay District Municipal Act (Bombay Act III of 1901) sections 3 (7), 96†—Notice of new buildings—Reconstructing side wall of a house on its old foundation not necessarily new building—Building, interpretation of

The accused owned a house one of the side walls of which had fallen down He rebuilt it on its old foundation without having previously obtained

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* Criminal Appeal No 472 of 1910

† The Bombay District Municipal Act, sections 3 (7) and 96 so far as they are material to this report, run as follows —

Section 3 (7) —'Building shall include any hut, shed, or other enclosure whether used as a human dwelling or otherwise and shall include also walls, verandahs fixed platforms plinths door steps and the like

Section 96 —Before beginning to erect any building or to alter externally or add to any existing building or to re construct any projecting portion of a building in respect of which the Municipality is empowered by section 92 to enforce a removal or set back the person intending so to build alter or add shall give to the Municipality notice thereof in writing

Notice of new buildings

* * * * * * *

permis ion of the Municipality He was thereupon charged, under section 96 of the Bombay District Municipal Act (Bombay Act III of 1901) for having erected a building without permission of the Municipality — 1911

EMPEROR v. B H DESOUZA

Held that the accused committed no offence under section 96 for it could not be said as a matter of law that the material re construction of a small wall must constitute the ' erection of a building

Emperor v *Kalekhan Sardarkhan*[1], distinguished

Per Curiam —It is recognized in England to be a rule with regard to the effect of interpretation clauses of a comprehensive nature that they are not to be taken as strictly defining what the meaning of a word must be under all circumstances but merely as declaring what things may be comprehended within the term where the circumstances require that they should

The Queen v *The Justices of Cambridgeshire*[2], *Meux* v *Jacobs*[3] and *Mayor &c of Portsmouth* v *Smith*[4], followed

THIS was an appeal by the Government of Bombay, from an order of acquittal passed by G R Dabholkar, First Class Magistrate of Bandra

The accused owned a house within the municipal limits of Bandra One of the side walls of the house had fallen down He re constructed the wall on its old foundation, without having

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EXPLANATION —The expression 'to erect a building' throughout this chapter includes—

(a) any material alteration, enlargement or re-construction of any building

(b) the conversion into a place for human habitation of any building not originally constructed for human habitation,

(c) the conversion into more than one place for human habitation of a building originally constructed as one such place

(d) the conversion of two or more places of human habitation into a greater number of such places

(e) such alterations of the internal arrangements of a building as affect its drainage ventilation or other sanitary arrangements or its security or stability, and

(f) the addition of any rooms buildings or other structures to any building and a building so altered enlarged re constructed converted, or added to is throughout this chapter, included under the expression a new building "

(1) (1910) 35 Bom 236
(2) (1838) 7 Ad & E 480
(3) (1875) L. R 7 H L 481
(4) (1885) 10 App Ca. 364

1911.

EMPEROR v. R. H. [illegible]

previously obtained permission of the Municipality. Upon these facts, he was charged with the offence made punishable under section 96 of the Bombay District Municipal Act (Bombay Act III of 1901). The Magistrate acquitted him on the ground that the accused was not erecting a building so as to come within the section.

The Government of Bombay appealed against the order of acquittal.

G. S. Rao, Government Pleader, for the Crown.

Nilkanth Atmaram, for the accused.

The appeal was heard by Chandavarkar and Heaton, JJ., but their Lordships, having differed in opinion, delivered the following judgments.

CHANDAVARKAR, J.:—I regret I have to differ from my learned colleague in this case. With all respect I find I cannot agree with him in holding that the question arising here for our decision is one of fact. In my opinion the facts found by the learned Magistrate are as alleged by the complainant. So the Magistrate states in his judgment and the only question is, whether upon those facts, the act of the accused is of such a nature as to make it punishable under section 96 of the Bombay District Municipal Act.

The fact found by the Magistrate is that the accused reconstructed the south wall of his house on the old foundation. That is the only fact. The case is thus on all fours with *Emperor* v. *Kalekhan Sardarkhan*[1], and I entirely concur in its exposition of law and interpretation of the material section of the Act. In my opinion, a wall such as this expressly falls under the Act within the definition of "building" and its reconstruction amounts to erecting a building of which notice must be given as required by the Act. I would allow the appeal and convict the accused. But as my learned colleague and I differ, the case must be submitted to the learned Chief

(1) (1910) 12 Bom. L. R. [illegible]

Justice for the purpose of reference, according to law, to a third Judge

HEATON, J —B H DeSouza was prosecuted under section 96 of the District Municipal Act (Bombay Act III of 1901) for beginning to erect a building without giving the required notice He was acquitted and the Government of Bombay have appealed against the acquittal

The facts are that he rebuilt the entire southern wall of his house except the foundations He also repaired two other walls, but those repairs were not taken by the Government Pleader as affecting the case He relied exclusively, and it seems to me rightly, on the rebuilding of the southern wall

By the explanation to section 96 "to erect a building" includes "any material alteration, enlargement, or re construction of any building" There has not been a material alteration or enlargement but there has been re construction of the southern wall of the house Is that a re construction of a building? The Government Pleader argues that it is because by the defining section of the Act "building shall include any hut, etc, and shall include also walls, verandahs, fixed platforms plinths, door steps and the like" This may mean that any wall or door step, etc, is in itself a building, or that a building includes all its walls, door-steps, etc If the former interpretation be taken then the southern wall of DeSouza's house is a building and it has been re-constructed This is the case argued by the Government Pleader It the latter interpretation is taken, then the southern wall of the house is only a part of the building, the building is the whole house

If we were dealing with a wall standing by itself we should be dealing with a building But where we have a complex building such as a house, it seems to me that the "building" meant by section 96 is the whole house and not a selected portion of that whole such as the southern wall

My reasons for so thinking are these sections 92 to 98 of the Act deal with "powers to regulate building, etc" These sections deal with buildings, parts of buildings, external walls of buildings projecting portions of a building, and in section 98

1911

I MPEROR v. B H DESOIZA

the plinth is referred to, clearly, as a part of a building The explanation to section 96 from (b) to (d) and (f) clearly contemplates complex buildings as entities The scheme of these sections, it seems to me, contemplates a "building" ordinarily as a complex structure made up of walls, etc I do not say that it does not contemplate simple structures also, such as an isolated wall But when we have a complex structure such as a house, the building as contemplated by section 96 is the whole house and a single wall of the house is not by itself a building but only a part of a building

Therefore, I think that this appeal on the ground on which it is argued must fail, for the argument is that there has been re construction of a building, not merely of a part of a building

At the same time I do not wish to be understood to say that the re construction of a wall cannot be a re construction, within the meaning of section 96, of that building of which it forms a part It may be the section intended to leave it to be determined as a question of fact in the particular case, whether the re construction of any particular wall or portions of a building is substantially a re construction of the building It may mean this If it does, then it is a question of fact whether there has or has not been substantially a re construction of the building The Magistrate has found in this case that there has not been a re construction The materials on the record do not enable me to say that he is wrong

Therefore I would dismiss the appeal

Owing to this difference in opinion, the case was heard by Scott, C J

G S Rao, Government Pleader, for the Crown

Ratanlal Ranchhoddas, for the accused

SCOTT, C J —The question referred to me may be formulated thus Whether the re construction of a wall upon its own foundation is necessarily the erection of a building' within section 96 of the District Municipal Act? According to the explanation appended to that section the expression 'to erect a building' throughout Chapter IX includes any material altera

tion, enlargement, or re-construction of any building Whether the re construction of a wall of whatever importance forming part of a house is necessarily the 'erection of a building', depends upon whether the interpretation-clause, section 3 (7), is to be taken as substituting impliedly for the word 'building' wherever it occurs in the Act not merely all erections falling within the ordinary comprehension of the term 'building' but also all other things included within the definition It is recognised in England to be a rule with regard to the effect of interpretation clauses of a comprehensive nature such as we have here that they are not to be taken as strictly defining what the meaning of a word must be under all circumstances, but merely as declaring what things may be comprehended within the term where the circumstances require that they should (see the judgment of Lord Denman in *The Queen* v *The Justices of Cambridgeshire*[1] of Lord Selborne in *Meux* v *Jacobs*[2], and of Lord Watson in the *Mayor &c of Portsmouth* v *Smith*[3])

In the present case the only complaint is that a small wall was built on an old foundation without the permission of the Municipality The Magistrate has held that in erecting this wall the accused was not 'erecting any building within section 96, and this conclusion must, I think, be accepted unless it can be said as a matter of law that the material re construction of a small wall must constitute the 'erection of a building'

For the reasons above stated I do not think that the Court is precluded from giving to the word 'building' in that section its ordinary meaning, a meaning which the neighbouring sections indicate as the sense in which the Legislature was using that expression in the group of sections of which section 96 forms part It is possible that the re erection of a wall may (under certain circumstances) amount to the material re-construction of a building under section 96, but I do not think it necessarily does In *Emperor* v *Kalekhan Sardarkhan*[4], referred to by Chandavarkar, J, the applicant had treated the re-erection

(1) (1838) 7 Ad & E 480 at p 491
(2) (1875) L R 7 H L 481 at p 493
(3) (1885) 10 App Cas 364 at p 375
(4) (1910) 35 Bom 225

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of his wall as falling within the section and had applied for leave to re erect it but did not wait to see if the permission would be granted or refused and there was no appearance on behalf of the accused In the present case the wall is a small wall and has all along been regarded by the applicant as not a building within the section 96 I concur with Mr Justice Heaton in thinking that the application should be dismissed

Application dismissed

I I

CRIMINAL REVISION

Before Mr Justice Chandavarkar and Mr Justice Heaton again, before Mr Justice Chandavarkar and Mr Justice Hayward

1911
April 10
June 2

EMPEROR v KESHAVLAL VIRCHAND *

Practice—Sentence—Magistrate passing non appealable sentence—Adding to sentence to make it appealable—Appeal to Sessions Judge—The Sessions Judge to entertain the appeal and to decide it on merits—Criminal Procedure Code (Act V of 1898) section 413

The Magistrate trying a case passed at first a non appealable sentence on the accused, but at the request of the accused, made an addition to the sentence passed so as to make it appealable When the accused appealed to the Sessions Judge his appeal was dismissed on the ground that no appeal lay inasmuch as the sentence first passed by the Magistrate was not appealable and the addition to the sentence could not be made legally In revision —

Held that the Sessions Judge had committed an error in holding that he had no jurisdiction to hear the appeal for though the Magistrate had no jurisdiction to alter the sentence once passed by him yet for the purposes of the Sessions Judge's jurisdiction so far as the appeal was concerned that was the very mistake which he was called upon to correct by way of appeal

When the appeal was heard again by the Sessions Judge he struck out the addition made by the Magistrate in the sentence and having done that, dismissed the appeal on the ground that the sentence appealed from was not appealable In revision —

Held that when the Magistrate had passed a sentence beyond one month an appeal lay to the Sessions Judge, under section 413 of the Criminal Procedure Code whether that sentence was passed legally or illegally

* Criminal Applications for Revision Nos 19 and 113 of 1911

Held, also that the Sessions Judge being once seized of the appeal the whole appeal became open to his Court, even on merits

1911

EMPEROR v. KESHAVLAL VIRCHAND.

THESE were applications made to revise the orders passed by Dayaram Gidumal, Sessions Judge of Ahmedabad, under the following circumstances

The applicant was tried by the City Magistrate of Ahmedabad, for an offence punishable under section 324 of the Indian Penal Code The Magistrate convicted the applicant of the offence charged, and sentenced him to undergo one month's rigorous imprisonment The applicant's pleader requested the Magistrate shortly afterwards to add one day's imprisonment to the sentence passed, to make it appealable The Magistrate acceded to the request The applicant then appealed to the Sessions Judge of Ahmedabad who admitted the appeal, but dismissed it on the ground that no appeal lay to his Court inasmuch as the sentence originally passed was unappealable and the Magistrate had no jurisdiction to make the addition

The applicant applied to the High Court

The application was heard by Chandavarkar and Heaton, JJ

D A Khare and *T R Desai*, for the applicant

G S Rao, Government Pleader, for the Crown

The following judgments were delivered

CHANDAVARKAR, J —The Sessions Judge has clearly committed an error in holding that his Court has no jurisdiction to hear the appeal, because of the alteration in the sentence, made by the Magistrate, after he had delivered judgment It is true that a Magistrate has no jurisdiction to alter his judgment and the sentence, after he has once delivered it and signed it But for the purposes of the learned Sessions Judge's jurisdiction, so far as this appeal was concerned, that was the very mistake which he was called upon to correct by way of appeal Therefore, the appeal was within his jurisdiction to that extent, at any rate We must, therefore, make the rule absolute and remit the appeal to the Sessions Court for disposal according to law

1911

EMPEROR v. KESHAVLAL VIRCHAND

HEATON, J —I agree The sentence which was actually imposed and that which, unless altered, the jailor will carry out, was the sentence of one month and one day's imprisonment It is an appealable sentence and when an appeal is presented that appeal ought to be heard It may be, and it is said in this case that it is so, that that sentence was illegally imposed If so, all the more reason for taking it up to the Appellate Court and for having it corrected by that Court Therefore, I think that the Sessions Judge was wrong in declining to hear the appeal, and that he was bound to hear and dispose of it according to law

The appeal was accordingly remitted to the Sessions Judge of Ahmedabad for disposal according to law The Sessions Judge on that occasion struck out the addition of one day's imprisonment which was made by the Magistrate This being done, he held that the sentence then left was non appealable He, therefore, dismissed the appeal without going into its merits

The applicant again applied to the High Court

G B Rele and *D A Khare*, for the applicant

L A Shah, acting Government Pleader, for the Crown

The application was heard by Chandavarkar and Hayward, JJ

Per Curiam —It is quite clear from the provisions of section 113 of the Code of Criminal Procedure, that where a Magistrate has passed a sentence exceeding one month, then an appeal lies, whether that sentence was passed legally or illegally The Sessions Judge being once seized of the appeal, the whole appeal becomes open in his Court, and therefore, the Sessions Judge ought to have heard this appeal on the merits also We make the Rule absolute and discharging the order under revision, we remand the appeal to the Sessions Court for disposal according to law, with reference to the observations made in this judgment

Rule made absolute

R R

ORIGINAL CIVIL

Before Mr Justice Robertson

NAMUBAI (PLAINTIFF) *v* DAJI GOVIND WARANG (DEFENDANT).* 1910 *September 24*

Civil Procedure Code (Act V of 1908), Order XXV, rule 1—Woman plaintiff—Application for security for costs—Suit for defamation—Court's discretion

N a widow brought an action against D, praying that D might be restrained from repeating or publishing certain defamatory statements concerning N, and that D might be ordered to pay Rs 5,000 or such other sum as the Court should think fit as damages D took out a summons in Chambers calling upon N to show cause why she should not give security for the payment of D's costs under Order XXV rule 1 Civil Procedure Code (Act V of 1908)

Held that under the circumstances of the case it would be a wrong use of the Court's discretion if the Court practically defeated the suit at that stage when it was almost if not quite ripe for hearing by ordering the plaintiff to lodge security

Held further that the Court was entitled as a discretion was given it under the section to exercise that discretion only upon certain terms which it was entitled to impose on the plaintiff

THE plaintiff a young widow of the Agri community, sued the defendant for defamation, alleging that on or about the 24th June 1910 the defendant falsely and maliciously without just cause or excuse and with the intent to disparage the reputation of the plaintiff said in Bombay that the plaintiff was in illicit intercourse with one Waman Hari Mahatre

The plaintiff further alleged that on or about the 27th day of June 1910 the defendant falsely and maliciously without just cause or excuse and with the intent to disparage the reputation of the plaintiff repeated in Bombay in the presence of others the said defamatory and false statement

In consequence of these statements the plaintiff received a letter dated 12th July 1910 from the *panch* of her community which was as follows —

The undersigned sends greetings to the whole of the Wadhkar Agri community On hearing a very bad report, the details of which are given below we pass the following resolution —

Daji Govind Warang liquor vendor in a shop at Wadala is circulating a report that Namubai, the widow of Bapuji Balaji Thakur is in illicit intercourse

* Suit No 640 of 1910

1910

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with Waman Hari Mahatre, a resident of the same place Under these circumstances, unless the lady gets the matter cleared up either through the community or the Courts, we the members of the community residing in this village will not be able to decide as to the truth or falsity of this report We the *panch* of the community have informed Namubai of this fearing that the community will be polluted in case the report is true so from today she and all the members of the family together with the children should not associate with the caste If they do so associate they will be responsible to the community They should not associate in any caste dinner or ceremony Until this charge is cleared up the members of the family of the lady whose names are Mahdeo Bapuji Thakur and Sadashiv Bapuji Thakur with their families are all excommunicated from the community

On receipt of this letter the plaintiff through her attorneys called upon the defendant to tender an unconditional apology but the defendant refused to do so The plaintiff thereupon filed the suit praying that the defendant might be restrained from repeating or publishing the said defamatory statements about the plaintiff, that the defendant might be ordered to pay to the plaintiff as and by way of damages the sum of Rs 5 000 or such other sum as the Court might deem fit and that pending the final disposal of the suit the defendant might be restrained from repeating or publishing the said defamatory statement

The defendant by his written statement denied that he made the allegations complained of or that he repeated the same He further denied that the plaintiff had been excommunicated On 15th September 1910 the defendant took out a Chamber summons calling upon the plaintiff to show cause why she should not give security for the payment of all costs incurred and likely to be incurred by the defendant

This summons came on for argument before Robertson, J, in Chambers on 21th September 1911

Shortt for the defendant in support of the summons

Mirza for the plaintiff showed cause

ROBERTSON, J —This is a summons taken out by the defendant calling upon the plaintiff to show cause why she should not deposit security for the defendant's costs under Order XXV, rule 1

The discretion given by that rule is one of the most difficult that a Court can be called upon to exercise On the one hand it is clear that to refuse to make the order would in a number of cases open the door to very great injustice being done to the defendant, who would be put in the position of having either to defend the suit at his own costs or to pay something to the plaintiff to settle the suit On the other hand it is perfectly clear that a rigid application of the power to order security to all cases, except the very narrow class, which was suggested by the defendant's counsel in this case, might very often result in nothing less than an entire denial of justice to the plaintiff merely on the ground that he or she had not sufficient money to prosecute the suit

In this case practically the only test I can apply to see whether I ought to make this order or not is the test of *bonâ fides* Is this a *bonâ fide* suit brought by this lady for the vindication of her honour and incidentally for the protection of her right to be paid maintenance? She is a Hindu widow and if she sits down under this accusation of unchastity, it is clear that it will not be long before steps are taken to deprive her of her maintenance For the purpose of seeing whether it is a *bonâ fide* suit or not, it appears to me that Exhibit B to the plaint is a most important document That purports to be a decision of a meeting of the caste, which took place on the 12th of July last It is signed by six of the leading members of the caste and states "On hearing a very bad report the details of which are given below we pass the following resolution Daji Govind Warang, liquor vendor in a shop at Wadala, is circulating a report that Namubai (that is the plaintiff), the widow of Bapu Balaji Thakur, is in illicit intercourse with Waman Hari Mahatre, a resident of the same place" I am not dealing with the point whether or not that is in any way evidence against Daji Govind Warang that he actually did circulate that report, but it shows that those who are in the best position to know were of opinion that he had been circulating the report, and therefore there is not the slightest rea on for doubting the plaintiff's *bona fides* in believing that it was Daji Govind Warang who did circulate the report I do not think that the

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letter of the 16th of July 1910, written by his solicitors on behalf of the defendant, is couched in such terms as would be likely to remove the strong suspicion that it was the defendant who had circulated this report, which would arise on the perusal of Exhibit B to the plaint, further I do not think myself that the written statement of the defendant is altogether so free from ambiguity as his counsel has suggested it is

Under these circumstances without in the least expressing an opinion of what the result will finally be it appears to me beyond all reasonable doubt that the plaintiff in filing this suit has been actuated by perfectly *bonâ fide* motives, and that it is filed in the *bonâ fide* belief that the defendant is the person who circulated this report, and for the *bona fide* purpose of protecting her right to maintenance, and defending herself against the gravest charges of immorality

Under these circumstances it appears to me that it would be a wrong exercise of the discretion that I have under Order XXV, rule 1, if I were to practically defeat the suit at this stage when it is almost if not quite, ripe for hearing, by ordering the plaintiff to lodge security At the same time I think that I am entitled, as a discretion is given me under the section, to exercise that discretion only upon certain terms, which I think I am entitled to impose upon the plaintiff And I only refuse this application on the distinct undertaking by the plaintiff that she will abandon all Police Court proceedings, which she has instituted against the defendant If she does not do that, then I shall be prepared to hear any renewed application that the defendant may make for the exercise of my discretion under Order XXV, rule 1 In the meantime I think that the defendant, having regard to the Police proceedings, which were taken against him, was excused for coming here to make this application No doubt the summons was taken out before the defendant knew anything about the Police Court proceedings, but the Police Court proceedings having been taken out, it is quite clear he would on its coming to his notice be entitled to come to this Court for protection from concurrent proceedings in the Police Court and in this Court,

by a confessedly impecunious party I, therefore, direct that the costs of this summons be costs in the cause, but the summons itself will be discharged Counsel certified

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Attorneys for the plaintiff Messrs *Sabnis* and *Goregaokar*

Attorneys for the defendant Messrs *Smetham, Byrne & Co*

Summons discharged

B N L

ORIGINAL CIVIL

Before Sir Basil Scott Chief Justice

THE WEST END WATCH COMPANY (PLAINTIFFS) v THE BERNA WATCH COMPANY (DEFENDANTS)*

1910
November 22

Trade mark—Imitation—Abandonment—Intention—Defendants improperly representing that their business to be business carried on by plaintiffs—Injunction—Raising of issue—Practice—Procedure

The plaintiffs had since the year 1887 been importing into and selling in India watches manufactured at the St Imier Factory in Switzerland These watches bore the name Berna on the dial In 1907 the plaintiffs complained of the watches supplied by the St. Imier Factory and began to import watches largely from other manufacturers, while they ceased giving orders to the St Imier Factory In the year 1908 the St. Imier Factory was purchased by the defendants and at the time of purchase the defendants asked the plaintiffs whether the defendants could positively count upon the plaintiffs to be their regular customers for the articles previously taken from the St Imier Factory The plaintiffs replied that they were willing in principle to reserve a part of their orders for the defendants, but that it would first be necessary for the latter to give an idea of what they were going to manufacture and the improvements they were going to make in the quality of the watches In one of their catalogues printed in 1907 the plaintiffs announced —

We take this opportunity of informing our customers that the name Berna will be changed to Service as soon as our present stock of these watches is sold out The trade mark will in other respects remain unaltered The alteration of the name is done to secure a trade mark which cannot be imitated in India or elsewhere '

On the 6th of November 1908 the defendants opened a place of business in Bombay and issued a circular dated February 1909 in which, on behalf of the

* Original Suit No 297 of 1909

1910

West End Watch Company v Berna Watch Company

defendant Company they referred to the plaintiffs as the defendants agents who had sold 600 000 watches made at the St Imier Factory in past years and proclaimed that Berna Company's watches would no longer be sold by their former sole agents importers (meaning the plaintiffs) as the defendants had decided to get rid of any middleship and to deal directly themselves

The plaintiffs thereupon filed a suit on the 2nd April 1909 against the defendants to restrain them from using and imitating various trade symbols alleged to belong to the plaintiffs and from representing that the defendants business was the business carried on by the plaintiffs

Held, that the plaintiffs for the last three years both in their dealings with the supplying factory and with their customers evinced very clearly and consistently their intention to abandon the name Berna as a quality mark for their watches and it followed that they could no longer claim any exclusive title to the use of that name either alone or in a trade mark.

Held further that the plaintiffs were entitled to an injunction restraining the defendants their servants, agents travellers and representatives, respectively from in any manner representing that the defendant Company had been or were carrying on the business carried on by the plaintiffs or were the successors in business of the plaintiffs

Per Curiam —The importer who by advertising and pushing the sale of goods under a particular mark secures a wide popularity for the mark in relation to the goods sold by him is entitled to the protection of the Court for that mark in the country of importation even against the producer of the goods *Damodar Ruttonsey* v *Hormasji Adarji*(1) and *Lavergne* v *Hooper*(2), referred to.

The fact that the user of a word or mark always uses it in conjunction with his own name is not conclusive to show that the word or mark cannot be claimed as a trade mark or that the user has waived his rights in it as a trade mark

The question of abandonment is one of intention to be inferred from the facts of the case *Mouson & Co* v *Boehm*(3) and *Lavergne* v *Hooper*(2) followed

The practice of raising a number of issues which do not state the main questions in the suit but only various subsidiary matters of fact upon which there is not agreement between the parties is very embarrassing Issues should be confined to questions of law arising on the pleadings and such questions of fact as it would be necessary for the judge to frame for decision by the jury in a jury trial at *nisi prius* in England

The facts of this case are set out in the judgment

Bahadurji and *Jinnah* for the plaintiffs

R D N Wadia and *Datar* for the defendants

(1) Appeal No 942 in Suit No. 69 of 1893 (2) (1884) 8 Mad 149

(3) (1884) 26 Ch D 398

Scott, C J —The plaintiffs sue to restrain the defendants from using and imitating various trade symbols alleged to belong to the plaintiffs and from representing that the defendants' business is the business carried on by the plaintiffs

At the commencement of the hearing eighteen issues were proposed, very few of which touched the real questions in the suit The first ten of those issues were founded on various statements in the narrative of facts contained in the plaint This is in accordance with a practice which has grown up at the Original Side of raising a number of issues which do not state the main questions in the suit but only various subsidiary matters of fact upon which there is not agreement between the parties The effect is very embarrassing and the practice has often been condemned by trying judges In my opinion issues should be confined to questions of law arising on the pleadings and such questions of fact as it would be necessary for the judge to frame for decision by the jury in a jury trial at *nisi prius* in England

Having eliminated ten issues the Court recorded eight, but they do not specifically cover the questions chiefly in issue in the suit, which are, in my opinion, as will appear from this judgment, whether the plaintiffs have abandoned their most popular trade symbol and whether the defendants have improperly represented that their business is the business carried on by the plaintiffs

At the outset it is necessary to trace the history of the plaintiffs' firm in relation to the Watch Factory at St Imier which is now the property of the defendants In 1884 a watch business, the name of which in 1887 became the West End Watch Co was started in Bombay by the Swiss firm of Droz & Co and one Charpie Droz & Co were the owners of a watch factory at St Imier, and it was chiefly their watches which were sold by the West End Co Charpie retired in 1887 from the Bombay firm which then became the property of Droz & Co exclusively, and so remained until 1891 when A Amstutz was introduced as a partner with Droz & Co In 1904 Droz & Co the exclusive owners of the St Imier Factory, got into difficulties and converted their manufacturing business into a Joint Stock Company

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under the name of the Fabrique D'horlogerie Berna The West End Watch Co supported the flotation by taking up a large number of shares in the new Company

At the same time the firm of Droz & Co retired from the West End Watch Co and their interest therein was purchased by A Amstutz and Constant Droz, the younger of the Droz brothers who are interested in this suit

The result of this arrangement was that the owners of the St Imier Factory no longer had any interest in the West End Watch Co, but the partners in the latter firm were interested in the factory as large shareholders and by covenant with the Joint Stock Company became entitled to the monopoly of all the products of the factory sent to India for a period of ten years

The Joint Stock Factory did not prosper, and in or about December 1907 went into liquidation The liquidators carried on the business till August 1908 when they agreed to sell it to a new Company of which the promoters appear to have been a watchmaker named De Goumois and Louis Droz, the elder of the two Droz brothers above mentioned, who had all his working life been interested or employed in the St Imier Factory It is probable that the ill success of the Fabrique D'horlogerie was due to want of support from the Bombay firm upon whose custom they were very dependent At any rate the Bombay firm complained in the year 1907 of the watches supplied by the factory and began to import watches largely from other manufacturers while they ceased giving orders to the St Imier Factory

In view of the importance of the Bombay connection De Goumois before buying the factory wrote to the plaintiffs (Exhibit G) on the 11th of August 1908, as follows —

"With reference to the conversation I had the pleasure to have the other day with Mr Amstutz I have the honour to inform you that I am on the point of buying the Fabrique Berna Before deciding definitively however I wish to approach you once more because I have been able to ascertain that up to the present year you were one of the best clients of this factory

I have already given you express assurances as to the improvements which I am anxious to make to the products of the Berna and as your dissatisfaction

arises from the defects you have found in those products it appears to me that there should be nothing in the way of our continuing the business relations which you entertained up to recently with the Berna since I give you the assurance that I am able to remedy the defects in question I am of opinion that the Indian market is necessary to the vitality of the Berna and I am persuaded that it would be to the mutual interest of both our houses if yours were to resume the old relations with the new house

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In fact I would be pleased to know—

(a) If I can positively count upon you to be my regular customers for the articles which you previously took from the Berna

(b) From what date you could eventually give me your regular orders

Amstutz replied, by Exhibit A 4, on the 18th August, that they were willing in principle to reserve a part of their orders for the eventual successor of the Berna, but that it would first be necessary for the latter to give an idea of what he was going to manufacture and what improvements he was going to make to the calibres and qualities the West End Watch Co were taking from the Berna

In the following month it appears from Exhibit 18 that the relations between De Goumois and Amstutz had become strained in consequence of a dispute as to the right to use the word 'Berna in connection with the sale of watches in India

De Goumois had complained to the liquidators, his prospective vendors, that Amstutz had declared he would prevent De Goumois from using the word in India, and the liquidators warned Amstutz that, if he harassed De Goumois in India, they would take severe measures against Amstutz in Switzerland

To this Amstutz replied that his firm would claim in India by all means the ownership of the word Berna' as a trade mark on the basis of a twenty years' user of the same to designate one of their qualities of watches

The history of the use of the word 'Berna' in connection with watches sent from St Imier to the plaintiffs in Bombay is as follows —

In the year 1887 a trade mark was designed at the factory at St Imier consisting of a bear and flag with the word 'Berna' and was marked on new watches sent to India The bear was

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objected to by the West End Watch Co as not suited to Indian tastes and was quickly abandoned for the Indian trade The word 'Berna,' however, was used on a certain quality of watch and in 1901 was included in a new trade mark, registered by Droz & Co in Switzerland in that year, consisting of two concentric circles, the inner being occupied by a star and crescent and the outer by the words Berna and Swiss Made This mark has been transferred on the Swiss Registry to the successive owners of the Factory including the defendants, and the defendants have also registered another mark with concentric circles, the inner being occupied with the initials B W and the outer with the words 'Berna Watch Co Swiss Made

Watches bearing the word 'Berna' on the dial whether alone or in the star and crescent trade mark above described were styled Berna watches in the plaintiffs catalogues, exhibited in this case, for the years 1897 to 1907 inclusive The watches so designated may be roughly described as the twenty rupee quality watches

In the extra edition of the plaintiffs' undated Catalogue No 43, which I take to have been published in the latter part of 1907, the Berna is called the Berna or Service Watch, the alternative designation being explained by the following remark —

We take this opportunity of informing our customers that the name Berna will be changed to Service as soon as our present stock of these watches is sold out The trade mark will in other respects remain unaltered This alteration of the name is done to secure a trade mark which cannot be imitated in India or elsewhere

Catalogue No 44 is in the same terms as regards these watches, but in Catalogue No 46 (the succeeding Catalogue relating to watches), which is the last one produced and probably belongs to the latter part of 1908, there is no Berna watch advertised but in its place the 'Secular,' which is introduced with the following remarks —

The Secular replaces the class of watches which we were formerly selling under the designation of Berna watches as the latter were watches which were designed twenty years ago and had become somewhat out of date

The change from 'Berna' to 'Service' and 'Secular' is rather differently explained by the plaintiffs and the defendants —

9 In the year 1907 the plaintiffs discovered that the word Berna as used in their trade mark for many years in India had without their knowledge been registered in 1901 by Droz & Co as a trade mark in Switzerland and the plaintiffs resolved to change the name of the particular quality of watch marked Berna to "Railway Service and 'Secular and they notified in their catalogues the change of name The plaintiffs however continued to receive and still receive orders for Berna watches (Plaint)

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8 The allegations contained in para 9 of the plaint are absolutely untrue In 1906 when the said Constant Droz was in Switzerland he told Louis Droz then delegate of the Council of administration of the said Fabrique Company that as the word Berna had been the registered trade mark of the Fabrique Company the plaintiffs had resolved to change the mark Berna on the watches imported by them into 'Railway Service and 'Secular The change was on his instructions accordingly made from the year 1907 (Written statement)

The plaintiff Constant Droz however, is not prepared to deny that a conversation, such as is alleged in the written statement and sworn to in evidence by Louis Droz, did take place Such a conversation is, moreover, consistent as regards the change to 'Service' with the remark in Catalogue No 43 extra edition

I have come to the conclusion that the real reason of the change was the certainty that the plaintiffs had that they would have to sever their business relations with the Factory at St Imier (which it may be noted is referred to by Amstutz on the 15th August 1908 (Exhibit A 4) as the Berna) and their desire to have a mark for their twenty rupee quality watch which would not involve them in controversy with the registered owners of the mark Berna' in Switzerland

On the 4th of November 1908, the new Company, started by De Goumois under the English name of the 'Berna Watch Co', took an assignment of the factory and its properties, and on the 6th of November Louis Droz, as representative of the new Company, came to Bombay and opened a place of business He then prepared and issued a circular dated February 1909, in which, on behalf of the defendant Company, he referred to the plaintiffs as the defendants agents who had sold 600,000 watches made at the St Imier Factory in past years and proclaimed that Berna Co's watches should no longer be sold by their former sole agents importers (meaning the plaintiffs), as the defendants had decided to get rid of any middleship and to

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deal directly themselves References are given at the close of the *circular to every* wearer of one of *the 600,000* Berna watches in use in India and every maker who has sold one Berna watch

The *immediate result of the circular* was *the institution*, on the 2nd of April *1909*, of this suit by the plaintiffs, who allege that one of the qualities of their watches was well known as the Berna watch, that the name Berna came to denote to the public *in India and Burma* a particular quality of watch imported and sold by the plaintiffs, and that though the name has been changed by the plaintiffs they have continued to receive orders for Berna watches

The plaintiffs' case, therefore, as originally framed, was based upon acquisition by user in India of the name Berna as a trade *mark* *This is a case* which *is* not *affected* by the successive registration in Switzerland of the Berna trade mark as appearing on the plaintiffs' watches by the different owners of the St Imier factory see *Rey* v *Lecouturier*[1]

That the importer, who by advertising and pushing the sale of goods under a particular mark secures a wide popularity for the mark in relation *to the goods* sold *by* him, is entitled *to* the protection of the Court for that mark in the country of importa tion, even against the producer of the goods, has been recognized by this Court in the unreported case of *Damodar Ruttonsey* v *Hormusji Adarji*[2] and by the Madras High Court in *Lavergne* v *Hooper*[3]

Although the word 'Berna' originated with the manufacturers, it is proved that buyers in India are not interested to inquire at what factory imported watches may have been made Importing firms have acquired reputations by selling and advertising watches of grades suitable to different classes of Indian buyers, and by taking care that all but the very cheapest watches are properly regulated before they pass to the buyers Amongst importing *firms the plaintiffs' reputation stands at least as high* as any It is contended that the plaintiffs never used the word Berna as a trade mark because it is always found in conjunction

(1) [1908] 2 Ch 715.

(2) Appeal No 042 in Suit No 69 of 189_

(3) (1884) 8 Mad 149 at p 154

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with the name West End Watch Co This argument is based upon the decision in *Richards* v *Butcher*[1], where the Court was only concerned with the question whether a word had been 'used as a trade mark' in the sense contemplated in section 10 of the Trade Marks Registration Act, 1875 That case has no application here The fact that the user of a word or mark always uses it in conjunction with his own name is not conclusive to show that the word or mark cannot be claimed as a trade mark or that the user has waived his rights in it as a trade mark Thus in *Braham* v *Bustard*[2] and in *Lavergne* v *Hooper*[3] the successful owners of the marks used their own names in conjunction with them, and this is, so far as I am aware, the general practice

The evidence, I think establishes that the word 'Berna' had up to the date of suit been associated in the minds of watch buyers in India with a very popular grade of watch sold by the plaintiffs, and it follows that, if there has been no abandonment, the plaintiffs are entitled to an injunction against any other persons importing and selling watches under that name notwithstanding that the plaintiffs' name has, in addition to the word or trade mark Berna, always appeared on every one of their watches and is well known to all dealers

I propose, therefore, to discuss whether the plaintiffs have abandoned their right in the name Berna as a symbol of a particular quality of watch sold by them The matter is by no means settled by a reference to the declaration of Amstutz that his firm would claim in India by all means the ownership of the word Berna as a trade mark, for there can be no property in a trade mark in gross apart from goods of which it has become the symbol see *Thorneloe* v *Hill*[4] The question of abandonment is one of intention to be inferred from the facts of the case see *Mouson & Co* v *Boehm*[5] and *Lavergne* v *Hooper*[3]

In the first place the declaration of Amstutz may be met by the statements in the catalogues to which I have above referred in discussing the use of the word Berna prior to suit

(1) [1891] 2 Ch 522 at p 513.
(2) [1863] 1 H & M 447
(3) (1884) 8 Mad 149 at p 154
(4) [1894] 1 Ch 569 at p 577
(5) (1884) 26 Ch D 398 at p 405

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offered to destroy it The plaintiffs also rely on an advertisement in a Rangoon paper of the 13th November 1909, which was inserted by the defendants agent Dankner and is shown to have had the approval of Louis Droz, the defendants representative in Bombay (See advertisement Exhibit A 2 and Exhibit Q)

The watch figured in the advertisement is a new watch introduced recently by the defendants under the name of Berna New D P having a new adaptation of an old movement not found in the watches theretofore known in India as Berna watches through the business dealings of the plaintiffs

The advertisement is, however, headed in large type '*The Berna*' and includes a statement as to the official adoption of the watch by certain Railway Companies, a statement which is wholly false as regards the defendants' Berna New D P and is copied verbatim from the plaintiffs unamended Catalogue No 43

The relation of the defendants and Danker, the Rangoon advertiser, were those of principal and agent Danker did not buy from the defendants but received watches of which he was bound to remit the proceeds when sold at the end of each month The advertisement though paid for by Danker was approved by Louis Droz who said the defendants would pay Rs 10 per month towards the cost of the advertisement translated into the Burmese language (see Exhibit Q)

In my opinion the advertisement is both a direct misrepresentation as to the business and goods of the defendants and a breach of the injunction of the 6th April 1909 whereby the defendants, *their servants and agents, were restrained from* publishing or representing that the defendants' business has anything whatever to do with the plaintiffs' business

Other complaints of the plaintiffs relate to the marks known as The West End Co with Eagle and The Matchless with Locomotive As to the first it is sufficient to say that the evidence does not disclose that the Eagle mark has acquired any reputation among Indian buyers, and that the defendants are only using an eagle mark without the words West End Co As regards the Matchless with Locomotive it is common ground that the Locomotive mark is *publici juris* and that the word Matchless was

adopted by the plaintiffs as distinctive from the word Maxim which in combination with a Locomotive was a registered trade-mark of the factory in Switzerland which has now passed by assignment to the defendants In my judgment no case of passing off has been made out against the defendants in respect of either of these marks

The plaintiffs also complain that the defendants are imitating the boxes in which the plaintiffs watches have generally been sold These are red boxes having a representation stamped on them of the St Imier Factory together with reproductions of certain medals awarded at Exhibitions for products of the St Imier Factory The evidence does not satisfy me that buyers attach any importance to these boxes If there were such evidence it is doubtful if the Court would grant relief to the plaintiffs in respect of them now that their business relations with the St Imier Factory have ceased Much time has been consumed in the discussion of various assignments, executed in Switzerland in the years 1901, 1901 and 1908 I do not think they help the plaintiffs' case The two matters seriously in dispute are the right to the use of the word 'Berna' and the question whether the defendants are or were improperly representing their business to be the business formerly carried on by the plaintiffs The defendants can use the word 'Berna' in India only if the plaintiffs abandoned its use Once the abandonment is established the Swiss assignments assuming them to assign the Berna trade mark to the plaintiffs absolutely, can be of no assistance to them

I pass a decree for the plaintiffs for an *injunction restraining* the defendant Company, their servants, agents, travellers, and representatives respectively, from in any manner representing or causing or procuring to be represented or doing anything which shall lead to the belief that the defendant Company have been or are carrying on the business carried on by the plaintiffs or are the successors in business of the plaintiffs, and from employing using or circulating or causing to be employed used or circulated any circulars notices or advertisements which shall in any manner represent or lead to the belief that the defendant Company are carrying on or have succeeded to the business of the plaintiffs

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The plaintiffs will have their costs of suit up to and including the first day's hearing, and must pay to the defendants costs of four days' subsequent hearing Each party must bear their own costs not otherwise provided for

Attorneys for the plaintiffs Messrs *Captain* and *Vaidya*

Attorneys for the defendants Messrs *Bicknell, Merwanjee* and *Romer*

Suit decreed

B N I

APPELLATE CIVIL

Before Mr Justice Chandavarkar and Mr Justice Hayward

1911 *June 14*

SAMBHU BIN HANMANTA KOHAL AND OTHERS (ORIGINAL DEFENDANTS Nos 2 TO 4) APPELLANTS v NAMA BIN NARAYAN NAIKDE AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT No 1) RESPONDENTS *

Limitation Act (XV of 1877) Articles 132 144—Mortgage—Third person redeeming the mortgage at mortgagor's desire—Sale by mortgagor of his rights—Sale deed unregistered—Sale deed could be looked at for evidence of payment of money—Suit by mortgagor to redeem ignoring sale—Lienor's rights—Adverse possession by lienor—Registration Act (III of 1877) section 17—Evidence Act (I of 1872) section 91

The plaintiff mortgaged certain property with possession with defendant No 1 for Rs 601 on the 4th April 1873 On the 25th November 1878, defendants Nos 2 to 4, at the request of the plaintiff paid off the mortgage to defendant No 1, and for the sum so paid and for a further payment of Rs. 50 the plaintiff sold the property to defendants Nos 2 to 4 The document as to the sale was not registered, but ever since the purchase, the defendants Nos 2 to 4 were in possession as owners In 1907, the plaintiff filed a suit to redeem the mortgage of 1873 The defendants Nos 2 to 4 set up in reply the sale of 1878 and contended that the suit was barred by limitation —

Held that the sale deed being unregistered could not be looked at for proving the sale but it could be looked at as evidence of payment of money

Mahadnappa bin Dunappa v *Dari bin Bala*[1] and *Waman Ramchandra* v *Dhondiba Krishnaji*[2] followed

* Second Appeal No 950 of 1909

[1] (1890) P J 1 290 [2] (1880) 4 Bom 1 6

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SAMCHU BIN HANMANTA *v.* NAMA BIN NARAYAN

Held further that the redemption having been made by the defendants for the plaintiff with his knowledge and consent, they became entitled to hold the property as lienors and the plaintiff could not recover it from them without paying the amount of Rs 651

Mahomed Shumsool v *Shewukram*[1] followed

Held further that the defendants lien was alive for twelve years after 1878, that is up to the year 1890 (Article 132 of the Limitation Act of 1877), that when that period expired the lien was gone and their possession after that was without any right and that their title by adverse possession was perfected in 1902

Ramchandra Yashvant Sirpotdar v *Sadashiv Abaji Sirpotdar*[2] explained

Held, therefore that the plaintiff s suit was barred by limitation

SECOND appeal from the decision of K Barlee, Assistant Judge of Poona, reversing the decree passed by M G Mehta, Subordinate Judge of Khed

Suit for redemption

On the 4th April 1873, the plaintiff Nama Narayan Naikde mortgaged his lands with Ramkrishna Waman Pendse (defendant No 1) for Rs 601 The mortgage was a usufructuary mortgage

On the 25th November 1878 the defendants Nos 2 to 4 redeemed the mortgage at the plaintiff's instance and paid Rs 601 to defendant No 1 The plaintiff further received Rs 50 from the defendants Nos 2 to 4 and for Rs 651 so received sold the property to the latter The document of sale was not registered but the defendants Nos 2 to 4 were put in possession of the property the same day

In 1907, the plaintiff brought this suit to redeem the mortgage of 1873

The defendants Nos 2—4 contended in their written statement (*inter alia*) that the suit was barred by limitation and relied on the sale deed of 1878

The Subordinate Judge held that the mortgage of 1873 had been extinguished, that deed of sale not having been registered was inadmissible in evidence except as evidence of possession

(1) (1874) I R 2 I A 17 (2) (1886) 11 Bom 422.

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SAMBHU BIN HANMANTA v RAMA BIN NARAYAN

of defendants Nos 2—4, that the defendants had acquired title as vendees of the plaintiff and that the plaintiff's claim was barred by limitation He, therefore dismissed the suit

On appeal this decree was reversed by the District Judge He held that the deed of sale was inadmissible in evidence for any purpose and that the defendants had not established a title by adverse possession He remanded the case to the Court of the Subordinate Judge for finding what amount was due on the mortgage On remand, Rs 676 was found due A decree was therefore passed ordering the plaintiff to redeem the mortgage by paying Rs 676 in six equal yearly instalments

The defendants Nos 2 to 4 appealed to the High Court

Weldon, with *G A Dandekar*, for the appellants

Jayakar, with *V M Mone*, for the respondent

CHANDAVARKAR, J —The pleadings and the facts found by the Court below may be shortly stated for the purpose of the question of law, which has been very carefully argued by both the Counsel before us

The plaintiff brought the suit to redeem, alleging that he had mortgaged the property in dispute on the 4th of April, 1873, to defendant No 1's father and that the mortgage was with possession for Rs 601 Defendant No 1 in his written statement pleaded that the mortgage had been redeemed, and that, therefore, the suit did not lie as against him He alleged further that, ever since redemption, the property had been in the possession of defendants Nos 2 to 4 These defendants are appellants before us The contest, therefore, came really to be between the plaintiff and defendants Nos 2 to 4 These defendants in their written statement alleged that, on the 25th of November 1878, at the request of the plaintiff himself they had paid off the amount of the mortgage to defendant No 1's father, and that, for the sum so paid on the plaintiff's account and a further sum of Rs 50 paid by the defendants to the plaintiff, he had sold the land to the defendants The defendants also alleged that ever since their purchase they had been in possession as owners

1911

Sambhu bin Hanmanta v. Nana bin Narayan

Now, upon these pleadings, the questions which arose for determination were these (1) whether defendants Nos 2 to 4 had proved their title by purchase from the plaintiff, (2) whether, if that purchase were not proved, the defendants had established their title by adverse possession

The defendants relied upon Exhibit 33 in support of their purchase That was a document purporting to be a receipt passed by the plaintiff to the defendants, acknowledging the fact of the defendants having paid the sum of Rs 601 to defendant No 1s father, and having redeemed the property on his (i e, the plaintiff's) account, and also of his (i e, plaintiffs) having received a further sum of Rs 50 from the defendants The receipt then proceeded to state that the land had been sold by the plaintiff to the defendants for the sum of Rs 651

So far as the sale was concerned, the document could not be looked at, because it was not registered Therefore, the question of sale went out of the case under the Registration Act and under section 91 of the Indian Evidence Act

The only question that then survived was about adverse possession The burden of proof undoubtedly lay upon defendants Nos 2 to 4 at the outset But they had at the start this in their favour that, their title by purchase having gone out of the case, and there being no allegation on the part of the plaintiff that the defendants had been in possession, from the year 1878 down to the time of the suit, in virtue of some title derived from him their possession could only be regarded as that of trespassers Under these circumstances it was for the plaintiff to get rid of the presumption in favour of the defendants arising from the fact of possession since 1878

Now, the learned Assistant Judge has found as a fact that the mortgage amount had been paid off by the defendants Nos 2 to 4 He finds that upon the recitals in Exhibit 33 as to the payment of money The receipt could be looked at as evidence of that payment see *Mahadnappa bin Danappa* v *Dari bin Bala*[1], *Waman Ramchandra* v *Dhondiba Krishnaji*[2] The redemption

(1) (1875) P J, p 299 (2) (1879) 4 Bom 126

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SAMBHU BIN HANMANTA v. NAMA BIN NARAYAN

having been made by the defendants for the plaintiff with his knowledge and consent, as is found by the Assistant Judge on the strength of Exhibit 33, the effect of the transaction in law was this: defendants Nos. 2 to 4 became entitled to hold the property as lienors, and the plaintiff could not recover it from these defendants without paying the amount of Rs. 651. That is the law laid down by their Lordships of the Privy Council in *Mahomed Shumsool v. Shewukram*[1], and it has been followed by this Court in a series of cases, of which we may mention only one, *viz.*, *Lomba Gomaji v. Vishvanath Amrit*[2].

That having been the position of the parties at the time when the property was redeemed by the defendants for and on account of the plaintiff, the question is, what period of limitation applies to a suit of this kind, which must now be treated as a suit by the plaintiff to recover the property from the defendants who had a lien on it in respect of the amount paid for the redemption. The learned Assistant Judge holds, upon the facts he has found, that the defendants became mortgagees. The plaintiff never set up any mortgage nor did defendants Nos. 2 to 4. The District Judge should not have made out a case which neither party had set up as part of their pleadings unless from the facts the law warranted an inference to that effect. But plainly upon the facts the law justifies no other conclusion than that the defendants became entitled to hold the property subject to their lien, and that the plaintiff could not recover it from the defendants without paying off that lien. Therefore, the learned District Judge was wrong in applying the sixty years limitation, on his view that the transaction was one of mortgage. It may be that the sixty years' period would have applied, if the redemption had been effected by defendants Nos. 2 to 4, without the knowledge of the plaintiff. Where a person has mortgaged his property with possession, and the mortgagee while in possession is ousted by a trespasser, the trespass cannot necessarily be regarded as one affecting the rights of the mortgagor, because the latter, having the right to redeem only on the expiry of the mortgage period, has no right of immediate entry

(1) (1874) L. R. 2 I. A. 17.

(2) (1893) 18 Bom. 86.

to give him a cause of action, unless the trespass was directed against him and his rights *Chinto v. Janki*(1). That ruling cannot apply here. Defendants Nos. 2 to 4 went into possession with the plaintiff's knowledge, after having redeemed the mortgage for him. They held the property without any title except the right of lien. The plaintiff was bound to bring his suit to recover possession from them within twelve years: Article 144, Limitation Act. So long as the lien existed, there could be no adverse possession on their part. As was said by this Court in *Ramchandra Yashvant Sirpotdar v. Sadashiv Abaji Sirpotdar*(2), where a person holds the property of another as a lienor, such holding does not, in any way, contradict the ulterior proprietary right, "since it would be impossible for a man to hold a lien on his own property." "So long as a possession can be referred to a right consistent with the subsistence of an ownership in being at its commencement, so long must the possession be referred to that right, rather than to a right which contradicts the ownership." In the present case the lien of defendants Nos. 2 to 4 was alive for twelve years from the year 1878, that is up to the year 1890, under Article 132 of the Limitation Act then in force. Defendants Nos. 2 to 4 could have enforced it within that period. When that period expired, the lien was gone and their possession after that became that of persons holding without any right. Since then they have so held for more than twelve years. At the date of the suit brought in 1907 the defendants had their title perfected by adverse possession.

This conclusion is not inconsistent with the principle of the decision of this Court in *Ramchandra Yashvant Sirpotdar v. Sadashiv Abaji Sirpotdar*(2), above mentioned. There certain property had been mortgaged in 1847 by three co-sharers D, A and R. One of them, R, alone redeemed in 1853. In 1882 the heirs of D and A sued to redeem the whole of the property or their portions of it. The defence to the suit was that it was barred by limitation, as it had been brought more than twelve years after R had redeemed the property, and R's possession after such redemption had

(1) (1890) 18 Bom. 51. (2) (1886) 11 Bom. 422 at p. 424.

1911.

SAMBHU BIN HANMANTA v NAMA BIN NARAYAN

become adverse It was held that the suit was not barred and that there was no adverse possession The ground of the decision was that, in the case of a co sharer holding after redemption, limitation is computed only from the date when the possession becomes adverse by the assertion of an exclusive title to the knowledge of the person excluded and by submission on his part to the title thus set up That is also the law enunciated by this Court in *Gangadhar* v *Parashram*(1), where Jenkins, C J, said that " to constitute an adverse possession as between tenants in common there must be an exclusion or an ouster " The present is not a case of co sharers to attract to it the application of that law Plaintiff's suit must be held barred by limitation

We must, therefore, reverse the decree of the lower appellate Court and restore that of the Subordinate Judge with the costs of the appeal in the lower Court and of this second appeal on the respondents

Decree reversed

R R

(1) (1905) 29 Bom 300

APPELLATE CIVIL

Before Sir Basil Scott Kt, Chief Justice, Mr Justice Russell and Mr Justice Rao

1911 *June* 28

IN RE ABDULLA HAJI DAWOOD BOWLA ORPHANAGE *

Indian Stamp Act (II of 1899) section 2 (21) Schedule I Article 7—Instrument declaring trust—Fund composed of two parts—Absence of previous disposition in one part—Settlement—Disposition for charity of the other part—Appointment—Stamp duty

An instrument was prepared for the purpose of declaring trusts of certain funds devoted to charity The funds amounted to about Rs. 3 00 000 and came to the hands of the trustees from two sources About Rs. 1 00,000 was the result of appeals to various persons and the rest was provided by the executors of the will of one A H The instrument declaring the trusts was engrossed on

* Reference No 3 of 1911.

a stamp paper of Rs. 15 and a question having arisen as to whether the instrument was properly stamped

1911

ABDULLA HAJI DAWOOD BOWLA ORPHANAGE *In re*

Held, that so far as the fund of Rs. 1 00 000 was concerned, there being no previous disposition in writing of any part of it though some of the contributions were accompanied by letters from the donors expressing their wishes with respect to the funds contributed, the instrument was a settlement according to the definition in section 2 (24) of the Indian Stamp Act (II of 1899) and was chargeable with duty on Rs 1 03,200 at the rate of 8 annas per cent

Held also, that so far as the fund of Rs. 2 00 000 was concerned, the provisions of the will of A.H. amounted to a disposition for a charitable purpose and the instrument was an appointment chargeable with a duty of Rs 15 under Schedule I, Article 7 of the Indian Stamp Act (II of 1899)

REFERENCE by E L Sale, Superintendent of Stamps, Bombay, under section 57 of the Indian Stamp Act (II of 1899)

One Abdulla Haji Dawood Bowla made a will, dated the 15th July 1901, and died on the 11th November following He appointed Hormasji N Vakil and Haji Sulleman Abdul Wahed executors under the will which, *inter alia*, provided as follows —

I bequeath the sum of rupees two lakhs unto my said trustees upon trust for the disposal of the same for establishing and maintaining such a charitable institution as the acting trustees or trustee of this my will shall in their or his absolute and uncontrolled discretion think fit provided always that if during my lifetime I myself establish any charitable institution this bequest shall be deemed to be void to the extent of the amount which shall be spent or laid out in respect of such institution, though I shall not have expressly revoked it by a codicil or other writing

Mr S M Edwardes, the Police Commissioner of Bombay, being anxious to make some provision for destitute female children of the Mahomedan community of Bombay, wanted to raise funds *for the establishment of an orphanage He, therefore, wrote to* the said executors for assistance and they agreed to devote the said bequest to the purpose He also published an appeal for funds in newspapers and addressed letters to some leading Mahomedan residents in Bombay asking for donations Some of the addressees responded to the appeal by sending in funds accompanied in some cases by letters indicating the donors wishes in the matter The funds thus collected amounted to Rs 1,00,000 or thereabouts The whole fund aggregated to

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Rs 3,00,000, that is, Rs 2,00,000, the bequest under the will of Abdulla Haji Dawood Bowla, and about Rs 1,00,000 collected as donations

On the 17th December 1910 an indenture was executed between Messrs Edwardes, Hormasji N Vakil and Haji Sulleman Abdul Wahed whereby the said sum of Rs 3,00,000 was settled on an orphanage called "The Abdulla Dawood Bowla Mahomedan Female Orphanage," and conveyed the amount to the trustees thereby appointed The instrument was engrossed on a stamp of Rs 15 as declaration of trust under Article 64 (A), *Schedule I of the Indian Stamp Act (II of 1899)* and was presented for registration

The Superintendent of Stamps, being doubtful as to whether proper stamp duty was paid on the instrument, made the present reference under section 57 of the Indian Stamp Act (II of 1899) observing as follows —

In my opinion the said instrument is a 'settlement within the meaning of section 2 (24) of the said Stamp Act as amended by section 2 of Act XV of 1904 in that it is a non testamentary di position in writing of property made for a charitable purpose and that it is accordingly chargeable with stamp duty to the amount of Rs 1,6o5 under Article 58 (A)

I am advised, however that even if the said instrument be regarded as merely recording the terms of a disposition of property made for a charitable purpose still inasmuch as there had not been any previous disposition of the said funds or any of them in writing in the same terms as those contained in the said instrument the said instrument is chargeable as aforesaid

The attorneys of the trustees contend that the said instrument is merely chargeable with duty as a declaration of trust and that it is, under the circumstances, duly stamped

Strangman (Advocate-General) with *E F Nicholson* (Government Solicitor) for the Government

Cohen with *Little & Co* for the trustees

SCOTT, C J —The instrument upon which we have to adjudicate was prepared for the purpose of declaring the trusts of certain funds placed in the hands of trustees for the establishment, maintenance and management, of a home or homes for poor and destitute female children and waifs of the Mahomedan community in Bombay The funds amounting to about three

lakhs of rupees came into the hands of the trustees from two sources About one lakh was the result of appeals by Mr Edwardes, the Commissioner of Police, for funds for a female Mahomedan Orphanage The rest was provided by the executors and trustees of Abdulla Haji Dawood Bowla to whom a sum of two lakhs was bequeathed by their testator for the establishment and maintenance of such a charitable institution as the trustees should in their absolute discretion think fit

The question of Stamp duty has been argued as relating to two distinct matters which for the purposes of duty may be dealt with separately under section 5 of Act II of 1899

Dealing first with the funds resulting from Mr Edwardes' appeal we are unable to hold that any previous disposition has been made in writing of any portion of those funds It is no doubt true that some of the contributions were accompanied by letters from the donors expressing their wishes, with regard to the funds contributed, but such letters were not in themselves dispositions The disposition would be by delivery of a cheque or money passing the sum contributed to Mr Edwardes We hold, therefore, that the instrument before us is an instrument recording by way of declaration of trust the terms of the disposition of the fund collected by Mr Edwardes It is thus a settlement according to the definition in section 2 (24) and is chargeable with duty on Rs 1,03,200 at the rate of 8 annas per cent

Turning now to the funds brought in by the Bowla trustees, we hold that the provisions of the will amount to a disposition for a charitable purpose of the two lakhs of rupees from which the funds in question have accrued The instrument before us relates not to 'free property' to adopt the expression of the Court in *Massereene and Ferrard* v *Commissioners of Inland Revenue*[1], but to property already held upon a general charitable trust See *Pocock* v *Attorney-General*[2] The trustees in appropriating the money to the trusts declared by the instrument in question are exercising the power of appointment

(1) [1900] 2 I R 138 (2) (1876) 3 Ch D 342.

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conferred upon them by the will. The disposition was by the testator by the will and not by the trustees by this instrument See *Bai Motivahu v Bai Mamubai*[1] The instrument *qua* the Bowla funds is an appointment chargeable with a duty of Rs 15 under Schedule I, Article 7

Answer accordingly

G B R

(1) (1897) 21 Bom. 709

APPELLATE CIVIL

Before Mr Justice Chandavarkar and Mr Justice Hayward

1911 *July* 11

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL APPLICANT), APPELLANT *v* NARAYAN KASHIRAM SHET (ORIGINAL OPPONENT) RESPONDENT *

Civil Procedure Code (Act V of 1908), O XXXIII r 13—Civil Procedure Code (Act XIV of 1882), section 412—Suit in forma pauperis*—Settlement of suit out of Court—Court passing no order for payment of Court fees—Government applying for the payment—Practice and procedure*

A suit for partition brought in *forma pauperis* was settled out of Court On the 7th October 1908 the Court dismissed the suit but made no order for the payment of Court fees under section 412 of the Civil Procedure Code of 1882 At that date Government had ninety days time within which to apply to the High Court under its extraordinary jurisdiction Before the expiry of the period the new Civil Procedure Code came into force The Government, thereupon, applied to the Court under O XXXIII r 12 for an order as to payment of Court fees, but the Court declined to make the order On appeal —

Held (1) that the order passed by the Court under O XXXIII r 12 was an order within the meaning of section 47 and it was therefore appealable,

(2) that, before the expiry of the period within which the Government could have applied to the High Court under the old Code, the new Code had come into force and by it the Government were enabled to apply to the Court for an order under r 12 of Order XXXIII

(3) that the suit having been dismissed there was a failure of it, and the right accrued to Government to have the Court fee from the party defeated

APPEAL from an order passed by G B Laghate, First Class Subordinate Judge of Ratnagiri

* First Appeal No 208 of 1910

This was a suit for partition It was filed in *forma pauperis* The claim was valued at Rs 25,800-12 0 The claim was settled out of Court The Subordinate Judge passed an order on the 7th October 1908, dismissing the suit, but made no order under section 412 of the Civil Procedure Code of 1882

The new Civil Procedure Code of 1908 came into force in 1909 On the 6th June 1910 the Government applied to the Court of the Subordinate Judge under Order XXXIII, rule 12, for an order as to payment of Court fees by the plaintiff The Subordinate Judge dismissed the application

The Government appealed to the High Court

At the hearing, a preliminary objection was raised that the appeal did not lie

P B Shingne, for the respondent, in support of the preliminary objection —No appeal lies The case is governed by the Civil Procedure Code of 1882, and the remedy of the Government was to apply in revision

L A Shah, acting Government Pleader, for the appellant — Under the old Code of Civil Procedure the Government had ninety days within which to apply to the High Court Before the expiry of that period the new Code of 1908 came into force which gave the Government right to apply to the Court at any time (O XXXIII, r 13) And an order passed on such application is appealable

Per Curiam —The appeal lies

L A Shah —The lower Court ought to have made an order, inasmuch as there was a failure of plaintiff's case See *Secretary of State* v *Bhagirathibai*[1], and O XXXIII, r 12, of the Civil Procedure Code of 1908

P B Shingne —The case is governed by the old Civil Procedure Code of 1882 The rights which we have acquired under it cannot be taken away by the new Code The case does not fall under O XXXIII, r 12

(1) (1906) 31 Bom 10

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CHANDAVARKAR, J —The circumstances, under which this appeal has been preferred by Government to recover the Court fees in Suit No 261 of 1905, are shortly these That was a suit for partition and it appears it was settled by the parties out of Court The Court dismissed the suit upon their joint application, throwing the costs on the parties It was a pauper suit, and the Subordinate Judge directed that there should be no order under section 412 of the Code of Civil Procedure (Act XIV of 1882), i e, no provision made for the Court-fees to which the Government were entitled It is stated by the Government Pleader before us that no copy of the decree dismissing the suit was sent to the Collector, as required by Civil Circular No 65 of the High Court Civil Circulars Whether that was so or not, the suit having been dismissed in October 1908, Government had the right to come up to the High Court and ask this Court, in the exercise of its power under the extraordinary jurisdiction, to revise the order of the Subordinate Judge and make due provision for the payment of the amount of the Court fee That was the only remedy open to Government under the law then in force, and Government had, according to the rules of this Court, ninety days from the date of the Subordinate Judge's order But before these ninety days expired, the new Code of Civil Procedure had come into force, and rule 12 of Order XXXIII thereof gave the remedy to Government to apply at any time to the Court to make an order for the payment of the Court fees under rule 10 or rule 11 The order made by the Subordinate Judge in the decree dismissing the suit had been made without the knowledge of Government, and it was competent for the latter, therefore, to make an application to the Subordinate Judge under rule 12 That was done by the Collector The Subordinate Judge held however, that he had no jurisdiction to pass a fresh order It is against this order that Government now appeals It was urged that the appeal did not lie But the appeal being against the order passed by the Subordinate Judge on an application made by Government under rule 12, Order XXXIII, for payment under rule 10 or 11 of the same Order, it is an order under section 47, and, therefore, appealable

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As to the merits of the case, there can be no doubt that, although at the time the suit was dismissed, the only remedy open to Government was to come up to this Court for the exercise of its power under the extraordinary jurisdiction, yet, before the period prescribed for Government to avail itself of that remedy could expire, a new law had come into force, the law was one of procedure The right was kept intact as it had been under the old law, but a new remedy was given, and that was under rule 12, Order XXXIII Therefore it was quite open to Government to make an application and ask the Subordinate Judge to pass a proper order according to law The Subordinate Judge who had declined to make any order under section 412 of the Code of 1882 had clearly committed an error in law The suit had been dismissed It may be that was because the parties had settled the matter out of Court, but the Court had nothing to do with that nor had the Court to do anything with the fact that the dismissal of the suit was upon the joint request of the parties Whether it was upon the request of the parties or not, the suit had been dismissed, and the suit having been dismissed, there was a failure of it, and the right accrued to Government to have the Court fee from the party defeated The party defeated was the plaintiff That was the proper order to make see *Secretary of State v Bhagirathibai*[1]

For these reasons the decree appealed from must be reversed and the decree in Suit No 261 of 1906 must be amended, so far as it relates to the order under section 412 of Act XIV of 1882, by deleting the order of the Subordinate Judge and substituting for it the following —"That Government do recover from the plaintiff the amount of Court fee, which would have been paid by the plaintiff, if he had not been allowed to sue as a pauper"

The costs of this appeal and of the application to the lower Court must be upon the respondent

Decree reversed

R R

(1) (1906) 31 Bom 10

APPELLATE CIVIL

Before Sir Basil Scott, Kt, Chief Justice and Mr Justice Rao

1911. *June 27*

SADASHIV BIN MAHADU DHOLE (ORIGINAL DEFENDANT 1), APPELLANT, v NARAYAN VITHAL MAWAL (ORIGINAL PLAINTIFF), RESPONDENT *

Civil Procedure Code (Act V of 1908), section 47—Limitation Act (IX of 1908), Article 138—Transfer of Property Act (IV of 1882) section 90—Purchase by decree holder—Suit to recover possession—Execution.

In execution of a redemption decree the decree holder (mortgagee) himself purchased the property at the court sale After the confirmation of the sale, the legal representative of the decree holder (mortgagee auction purchaser) brought a suit to recover possession of the property so purchased The defendants (representatives of the mortgagors judgment debtors) contended that the question involved in the suit related to the execution of the decree therefore, the suit was not maintainable under section 47 of the Civil Procedure Code (Act V of 1908) and that the plaintiff s remedy lay under Order 21, Rule 5 The first Court allowed the claim

On appeal by one of the defendants

Held, reversing the decree that

(1) The suit was barred by section 47 of the Civil Procedure Code (Act V of 1908)

(2) A decree-holder by becoming a purchaser at a court-sale did not cease to be a party to the suit within the meaning of section 47 of the Civil Procedure Code

(3) Proceedings for delivery of possession of property purchased by the decree-holder were proceedings in execution of the decree and fell within the scope of section 47 of the Civil Procedure Code

(4) Article 138 of the Limitation Act (IX of 1908) did not override the provisions of the Civil Procedure Code They should be read together Where the auction purchaser was also *a party to the suit in which the decree* was passed his claim for the delivery of possession of the property purchased must be determined by the Court in the execution department. But where the auction purchaser was a third party it was open to him to bring a suit for possession of the property purchased by him and such a suit would be governed by twelve years limitation under Article 138 of the Limitation Act

(5) Under section 90 of the Transfer of Property Act (IV of 1882) the execution proceedings did not terminate with the sale

* First Appeal No. 135 of 1910.

The execution of the decree being barred at the date of the suit, it was not allowed to be treated as a proceeding in execution

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SADASHIV BIN MAHADU v NARAYAN VITHAL

FIRST appeal against the decision of Rattonji Mancherji, First Class Subordinate Judge of Poona, in original Suit No 218 of 1909

The facts were as follows —

Two undivided brothers, Mahadu and Ganpati, owned an undivided ½ share in the lands in dispute They had monetary dealings with the plaintiff's father Vithal Ramchandra Mawal to whom they had passed several mortgage deeds with respect to their ½ share The total amount of the mortgages was Rs 13,000 On the 28th September 1883 the mortgagors filed a redemption suit, No 696 of 1883, in the Court of the First Class Subordinate Judge of Poona, and the decree in the suit which was dated the 14th February 1885 ordered the mortgagors to pay to the mortgagee Rs 7,905 with interest at 4 per cent per annum by seven yearly instalments, and in default of payment the amount should be realized by sale of mortgaged property The said decree was upheld by the High Court in appeal Default having been committed in the payment of the decretal amount, the decree holder (mortgagee) applied for the realization of the decretal debt by the sale of the mortgaged property As the judgment debtors (mortgagors) were agriculturists execution was transferred to the Collector and by his order the mortgaged property was sold on the 29th November 1899 and was purchased by the decree holder himself The sale was confirmed on the 6th January 1900 Subsequently the decree holder having died, his son and legal representative brought the present suit for the recovery of the property purchased by his father at the court-sale and mesne profits at Rs 150 per year

Defendant 1, Sadashiv, the son and legal representative of Mahadu, one of the judgment debtors, contended that the suit was not maintainable inasmuch as the plaintiff's father purchased the property in execution of his own decree, that according to section 47 of the Civil Procedure Code (Act V of 1908) the plaintiff should have taken action in execution of the

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SADASHIV BIN MAHADU v. NARAYAN VITHAL.

decree and his remedy was, therefore, under Order 21, Rule 2o, that the suit could not be treated as an application, the execution of the decree being time barred, and that he, being a minor, was not properly represented in the execution proceeding

Defendant 2, Bahiramji Rustomji, a purchaser from defendant 1, set up *inter alia* his title to one of the lands in suit, namely, Pratbandi No 14

The Subordinate Judge found that the plaintiff's claim was proved with respect to all the lands in suit except Pratbandi No 14, that the plaintiff was not bound to seek his remedy in execution proceedings that the estate of defendant 1 was sufficiently represented in execution proceedings and that the plaintiff was entitled to recover possession of all the lands except Pratbandi No 14 He, therefore, passed a decree for the plaintiff for the recovery of the lands in suit except Pratbandi No 14

With respect to the defendants' contention that the plaintiff should have moved under the proceedings in execution, for the want of any ruling of the Bombay High Court on the point, the Subordinate Judge followed the Full Bench ruling of the Allahabad High Court in *Bhagwati* v *Banwari Lal*[1] which laid down that "section 244 was not a bar to a suit like the present and the decree holder may obtain possession either by an application under sections 318 and 319 of the Code of Civil Procedure or by a separate suit"

Defendant 1 appealed

P D Bhide for the appellant (defendant 1) —The plaintiff should have sought his remedy in execution proceedings and not by a separate suit Although the plaintiff purchased the property at the auction sale he does not thereby cease to be a decree holder and the question of recovering possession of the property so purchased relates to satisfaction and execution of the decree under section 318 of the Civil Procedure Code (Act XIV of 1882) *Manickka Odayan* v *Rajagopala Pillai*[2], *Kasinatha*

(1) (1903) 31 All 8? (2) (1907) 30 Mad 07

Ayyar v *Uthumansa Rowtham*[1], *Muttia* v *Appasami*[2], *Sindhu Taraganar* v *Hussain Sahib*[3], *Sheo Narain* v *Nur Muhammad*[4], *Ram Narain Sahoo* v *Bandi Pershad*[5], *Kallayat Pathumayi* v *Raman Menon*[6]

The view taken by the majority of the Allahabad Full Bench in *Bhagwati* v *Banwari Lal*[7] is not in conformity with the view of the same Court in *Sheo Narain* v *Nur Muhammad*[4] and the opinion of the minority is in accordance with the view of the other High Courts Their Lordships of the Privy Council have ruled that section 244 of the Civil Procedure Code (Act XIV of 1882) should not receive a narrow construction *Prosunno Kumar Sanyal* v *Kali Das Sanyal*[8]

Section 318 of the Civil Procedure Code (Act XIV of 1882) which relates to the recovery of possession finds its place in the chapter dealing with execution proceedings, and when a cheap remedy is prescribed or special procedure is laid down, it should be adopted in preference to the general and costly one *Madhu sudan Das* v *Gobinda Pria Chowdhurani*[9]

In *Sunwal Das* v *Bismillah Begam*[10], *Muttia* v *Appasami*[11], *Sarafoolla Molla* v *Raj Kumar Roy*[12] and *Lakshmanan Chettiar* v *Kannammal*[13] it was held that an application for delivery of possession is a step in aid of execution The sale does not become complete and there is no complete satisfaction of the decree until the decree holder gets possession of the property The words "resistance to execution" in section 330 of the Code show that the Legislature treated this matter as relating to execution The object of section 244 is to provide a speedy remedy *Viraraghava Ayyangar* v *Venkatacharyar*[14], *Muttia* v *Appasami*[11] So also an application for recovery of money paid

(1) (1901) 2? Mad 5 0
(2) (1890) 13 Mad. 50
(3) (1904) 28 Mad 87
(4) (1904) 30 All. 7
(5) (1904) 31 Cal 737
(6) (1902) 26 Mad 740
(7) (1908) 31 All 82
(8) (189) 19 Cal 683
(9) (1899) 27 Cal. 34 at p 37
(10) (1897) 19 All 4?0
(11) (1890) 13 Mad 504
(12) (1900) 27 Cal 709
(13) (1900) 24 Mad 18?
(14) (188) 5 Mad. 217

into Court on account of the sale is held to be a step in aid of execution *Bapuchand* v *Mugutrao*[1], *Venkatarayalu* v *Narasimha*[2]

Article 138 of the Limitation Act cannot control the provisions of the Civil Procedure Code No doubt the decree does not directly provide for possession, but being a decree, under section 88 of the Transfer of Property Act there is a right of sale, and this circumstance is a process for the satisfaction of the decree The decree cannot be said to be satisfied until delivery of possession to the auction purchaser

The judgment-debtors were not properly represented on the record at the time of the sale The proper guardian of the judgment debtors was their mother and notwithstanding that she was living, she was ignored and some other relation of theirs was brought on the record as their guardian This circumstance vitiates the sale *Dakeshur Pershad Narain Singh* v *Rewat Mehton*[3], *Daji Himat* v *Dhirajram Sadaram*[4]

P P Khare for the respondent (plaintiff) —There can be no distinction between a decree holder auction purchaser and a stranger auction purchaser The decree holder auction purchaser is no longer a decree holder and he sues for possession in his capacity as auction purchaser *Mahabir Pershad Singh* v *Macnaghten*[5], *Bhagwati* v *Banwari Lal*[6] In the last Full Bench ruling the Allahabad High Court held that a decree holder auction purchaser cannot be said to continue as decree holder after his purchase and the question as to possession does not relate to execution or satisfaction of the decree Articles 138 and 180 of the Limitation Act make no distinction between a decree-holder auction purchaser and a stranger auction purchaser

Section 88 of the Transfer of Property Act does not provide for possession being delivered Hence the decree was satisfied

(1) (1896) 22 Bom 340
(2) (1880) 2 Mad 174
(3) (1896) 24 Cal. 25
(4) (1887) 12 Bom 18.
(5) (1889) 16 Cal. 682.
(6) (1908) 31 All 82.

immediately after the property was sold and purchased by the decree holder, and nothing further remained to be done Section 318 of the Civil Procedure Code is permissive and gives the purchaser an option to proceed in execution or to file a separate suit

The defendants' family was joint and there was proper representation

RAO, J —*The facts of the case are briefly these* The property in dispute was originally mortgaged by defendant 1's father and uncle to plaintiff's father On 11th February 1885 a decree was passed directing the mortgagors to pay Rs 7,905 4 3 by seven equal yearly instalments In default of payment of any instalment at the due date, the mortgaged property was to be sold for the whole sum due Default having been made in payment of the instalments, the mortgagee put up the property to sale and purchased it himself on 29th November 1899 The sale was confirmed on 6th January 1900

On 7th April 1903 plaintiff, who is the son and legal representative of the auction purchaser, filed the present suit for possession of the property purchased in 1899 Defendants resisted the claim on several grounds, but their contentions were overruled and a decree was passed in plaintiff's favour, awarding him possession of the property in suit except one piece of land, Pratbandi No 14, as to which plaintiff's title was not proved

Against this decree defendant 1 appeals to this Court

The main question argued in appeal is whether the suit is barred by section 47 of the Code of Civil Procedure, 1908

Section 47 provides that all questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to execution, discharge or satisfaction of a decree, shall be determined by the Court executing the decree and not by a separate suit We have to consider (1) whether the questions involved in the present suit arise between the parties to the suit in which the decree was passed or their representatives, and (2) whether they are questions relating to

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execution of the decree The judgment debtors are dead Defendant 1 is the son of one of the judgment debtors Plaintiff is the son and heir of the decree holder who purchased the property at the court sale held in execution of his decree It is contended for the respondent that the decree holder ceases to be a party to the suit after he purchases the property at the court sale, and that he is entitled to possession of the property in his character as auction purchaser, and not as a decree holder We are unable to accede to this contention In *Madhusudan Das v Gobinda Pria Chowdhurani*[1] Macpherson and Stevens, JJ hold that decree-holder is none the less a party to the suit because he happens to be an auction purchaser In *Ram Narain Sahoo v Bandi Pershad*[2] the Court observes, that the fact that the decree holder is also an auction purchaser does not make section 244 of Act XIV of 1882 the less applicable to the case Similarly the Madras High Court observes in *Kasinatha Ayyar v Uthumansa Rowthan*[3] "It would be impossible to hold that having been a party to the decree, he ceased to be a party because he purchased the property at the sale held in execution" No doubt in *Bhagwati v Banwari Lal*[4] a Full Bench of the Allahabad High Court hold, that although the same person may be the decree holder and the auction purchaser, he fills two different capacities and it is in the latter capacity only that he can apply for and obtain possession With all respect for the opinion of the majority of the Full Bench of the Allahabad High Court, we agree in the view taken by the Calcutta and Madras High Courts, that a decree holder by becoming a purchaser at a sale held in execution of his decree does not cease to be a party to the suit within the meaning of section 47 of the Civil Procedure Code

The next question is whether the plaintiff's claim for delivery of possession of the property in dispute is a question relating to execution, discharge or satisfaction of a decree within the meaning of section 47 of the Civil Procedure Code It is contended that the execution proceedings came to an end when

(1) (1899?) 27 Cal. 34

(2) (1904) 31 Cal. 737 at p. 742.

(3) (1901) 25? Mad. [illegible] at p. [illegible]

(4) (1908) 31 All. 8?

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the property was sold and the sale confirmed This contention does not appear to us to be sound We are of opinion that proceedings in execution (so far as the decree holder is concerned) are not completed until the decree holder obtains the benefit of the sale held in execution of his decree In *Bapuchand* v *Mugutrao*[1] it was held by this Court that an application by a judgment-creditor for payment to him of money which has been paid into Court on his account in execution of his decree, is an application to take a step in aid of execution of the decree In that case Farran, C J observes that when money is paid into Court in satisfaction of a decree, the execution of the decree with regard to such payment is not fully completed till the money has been actually paid by the Court to the judgment creditor That is also the view taken by the Madras and Allahabad High Courts See *Koormayya* v *Krishnamma Naidu*[2], *Paran Singh* v *Jawahir Singh*[3] and *Sujan Singh* v *Hira Singh*[4] If then an application made by a decree holder to be paid the proceeds of a sale held in execution of his decree is a step in aid of execution, we do not see any difference in principle between such an application and an application made by a decree-holder who is also the auction-purchaser to be put in possession of that which represents the money which would have been paid into Court, if a third party had purchased the property We think that the execution of the decree is not complete and final, until in the one case the decree holder actually receives the sale proceeds through the Court, and in the other case until he secures possession of the property through the Court Accordingly it is held that an application by a decree holder to be put in possession of the property which he has purchased in execution of his decree is a step in aid of execution of that decree See *Sarfatoolla Molla* v *Raj Kumar Roy*[5], *Jalsh ranan Chettiar* v *Kannammal*[6] *Kasinatha Ayyar* v *Uthuransa Rowthan*[7] *Moti Lal* v *Makund Singh*[8] The object of the application for delivery of possession as observed

(1) (1896) 22 Bom 10

(2) (1893) 17 Mad 165

(3) (1884) 6 All 366

(4) (1889) 12 All 399

(5) (1900) 27 Cal 709

(6) (1900) 24 Mad 185

(7) (1901) 25 Mad 529

(8) (1897) 19 All 477

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SADASHIV BIN MAHADU *v.* NARAYAN VITHAL

by Maclean, C J, in *Sariatoolla Molla v. Raj Kumar Roy*[1], "is to complete, by giving possession, the purchase which the applicant has made It is a step in aid of execution in the sense that it is a step to make that which has been done final and complete, and in this sense to aid the execution which can hardly be said to have been complete"

This being the case, proceedings for delivery of possession to the auction purchaser are proceedings in execution of a decree, and fall within the scope of section 47 of the Civil Procedure Code See *Madhusudan Das v. Gobinda Pria Chowdhurani*[2], *Ram Narain Sahoo v. Bandi Pershad*[3], *Kattayat Pathumayi v. Raman Menon*[4], *Kasinatha Ayyar v. Uthumansa Rowthan*[5], *Muttia v. Appasami*[6]

But it is argued by Mr P P Khare for respondents that Article 138 of the Limitation Act allows a suit to be brought by an auction purchaser to recover possession of the property sold within twelve years from the date of confirmation of the sale It is true that in Article 138 no distinction is made between a purchaser who is a decree holder and a purchaser who is not a decree holder But Article 138 does not override the provisions of section 47 of the Civil Procedure Code The two should be read together Where the auction purchaser is also a party to the suit in which the decree was passed his claim for delivery of possession of the property purchased by him must be determined by the Court in the execution department But where the auction purchaser is a third party, it is open to him to bring a suit for possession of the property purchased by him, and such a suit will be governed by Article 138 of the Limitation Act

It is lastly contended, that in the present case the decree in execution of which the property was sold being a decree for sale of the property mortgaged, the mortgagee-decree-holder was entitled under section 88 of the Transfer of Property Act to the sale proceeds only and not to possession of the property sold, and that when the sale took place, the execution proceedings

(1) (1900) 27 Cal [illegible] at pp 712, 713
(2) (18[illegible]) 7 Cal 31
(3) (1[illegible]) 31 Cal [illegible]37 at p [illegible]
(4) (1[illegible]) [illegible] Mad 710
(5) (1901) 2[illegible] Mad [illegible]
(6) (1[illegible]) 13 Mad 504

came to an end The answer to this contention is that section 90 of the Transfer of Property Act shows that the execution proceedings do not terminate with the sale, if the sale proceeds are insufficient to pay the mortgage debt, the decree-holder has to take further steps to recover the balance of the decretal amount

On all these grounds we hold that the plaintiff's claim for delivery of possession of the property in suit falls within section 47 of the Civil Procedure Code, and that this suit cannot lie We would have allowed the present suit to be treated as a proceeding in execution, but for the fact that the execution of the decree was barred by limitation at the date of the suit

Mr Bhide for the appellant contended that defendant 1 was a minor, that his estate was not properly represented in the execution proceedings in the course of which the land was sold, and that therefore the sale was a nullity He contends that there was fraud on the part of the decree-holder in representing to the Court that the minor's mother was dead though in reality she was alive, and in getting a distant relation of the minor appointed as a guardian *ad litem* The lower Court has found that the alleged fraud is not proved, and that the minor's estate was sufficiently represented during the execution proceedings We see no reason to come to a different conclusion There is no evidence whatever to prove the alleged fraud

We set aside the decree of the lower Court and dismiss the suit with costs throughout

Decree set aside

G B R

APPELLATE CIVIL

Before Mr Justice Chandavarkar and Mr Justice Hayward

1911. *July* 17

HAJI ABDULLA HAJI SUMAR (ORIGINAL PLAINTIFF), APPELLANT, *v* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT) RESPONDENT *

Bombay Land Revenue Code (Bom Act V of 1879) section 3, clause (19)[1]*—Village of Ghatkooper—*Kowl *(lease) for 99 years—"Alienated village—Agricultural lease—Buildings erected by occupiers on their respective lands—Extra assessment levied by Government—Right to levy extra assessment not parted with under the* kowl

The *kowl* (lease) of the village of Ghatkooper in the Thana District granted by Government on the 31st December 1845 for 99 years provided *inter alia* that the grantee should pay to Government annually a fixed sum with respect to the land which had already been under cultivation and "that as to waste lands the grantee should bring them all into cultivation within 40 years and on the expiration of that period the full assessment, according to the prevailing usage of the country should be collected annually from the grantee on such land as might be under cultivation as well as on such quantity as might remain waste out of the present waste entered in the public accounts" The *kowl* further provided that "In respect of the abovenamed village you (grantee) are to consider yourself as a farmer thereof You are therefore to exercise the authority vested in farmers by Chapter VI of Regulation XVII of 1827 or such as may hereafter be vested in them by any new enactment, shall also be exercised by you, and in the event of your acting contrary to the aforesaid enactments, you will be subject to such penalties as are now or may hereafter be provided for by Regulations"

Subsequently some of the occupants of the village having built upon their respective lands Government levied extra assessment from them under the provisions of the Bombay Land Revenue Code (Bom Act V of 1879) The grantee under the *kowl* himself claimed the right to levy extra assessment on the ground that the village was an "alienated" village within the meaning of clause (19) of section 3 of that Code and was therefore not liable to the provisions of the Code He therefore applied to Government for a refund either wholly or in part of the extra assessment collected by them and the

* First Appeal No 33 of 1910

[1] Section 3 clause (19) of the Bombay Land Revenue Code (Bom Act V of 1879)

3 In this Act, unless there be something repugnant in the subject or context—

* * * * * *

(19) "Alienated" means transferred in so far as the rights of Government to payment of the rent or land revenue are concerned, wholly or partially, to the ownership of any person.

Government having refused to grant his request he brought a suit against the Secretary of State for India in Council praying (1) for a declaration that (a) the extra assessment imposed by the defendant upon lands appropriated for building sites in the village was illegal (b) the Bombay Land Revenue Code (Bom Act V of 1879) was not applicable to the village, and (c) the resolution of Government to the effect that the *kowl* was agricultural was erroneous (2) that the defendant be restrained by a permanent injunction from levying the extra assessment (3) that in the event of its being found that the Government were entitled to levy the assessment, it be declared that the plaintiff was entitled to receive the same, and (4) that the amount, if any, received by the defendant on account of such assessment be awarded to him

The Court dismissed the suit.

Held, on appeal that having regard to the terms of the *kowl*, it was a lease of the revenues of the village on certain conditions The object of the lease was agricultural and Government never parted with their rights so far as the right to build was concerned

The *kowl* was no more than a lease The Government parted with their rights as lessors in favour of the grantee as lessee and imposed upon him certain conditions, none of which brought the contract within the definition of the term alienated village in clause (19) of section 3 of the Bombay Land Revenue Code (Bom Act V of 1879)

The clause in the *kowl*, that the grantee was to consider himself a farmer of the village and was to "exercise the authority vested in farmers by Chapter VI of Regulation XVII of 1827 or such as may be hereafter vested in them by any new enactment shall be exercised by you and you will be subject to such penalties as are now or may hereafter be provided for by Regulations brought the village within the operation of the provisions of the Bombay Land Revenue Code (Bom Act V of 1879)

FIRST appeal from the decision of P J Taleyarkhan, Joint Judge of Thana, in Original Suit No 15 of 1908

On the 31st December 1845, J S Lamb, who was then the Acting Collector of Thana, granted to one Ruttonji Edalji Parsee a *kowl* (lease) of the village of Ghatkooper in the Thana District for the period of 99 years Under the *kowl* that grantee was to pay to Government annually Rs 1,135-14-7, and it provided *inter alia* as follows —

2 The waste land of the village, including Junglgurk, Nallagurk and Nowsad etc. is hereby granted to you in *mafi* for 40 years from 1844-45 You are to make the necessary outlay and bring it under tillage out of the sweet waste land, one fourth within the term of ten years from the date hereof; and

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you should, in the same manner, continue to do so every ten years, so as to bring the whole of it under tillage within that period in failure whereof, the produce of the hay amounting to Rs 27 herein deducted, will be collected from you from the first to the last year of the exemption You are to prepare the salt land for cultivation within five years from 1844-45, but if you fail to do so, a fine of five hundred rupees (Rs 500) will be imposed on you and after the expiration of 40 years the full assessment according to the prevailing usage of the country will be collected annually from you on such land as may be under cultivation as well as on such quantity as may remain waste out of the present waste entered in the public accounts

6 The rights of the present proprietors of land and other privileges of any description whatever, remain unaffected by this lease It is clearly to be understood that this lease confers no right which Government does not now possess and only such portion of the rights of Government as may be herein specifically granted is hereby granted to you

8 Should a survey be made and a new assessment be introduced in the district, the same will also be done in your village, the land, etc., which has been granted to you free from assessment will however, remain uninterfered with till the period of exemption has expired, when the rates will be levied.

10 You are to pay all Devasthans and Dharmadaya allowances to those who have hitherto enjoyed them and also to continue all emoluments rights etc, hitherto held by the Patels and village officers according to established usage Should any complaint be made to Government on the subject you are to act according to its order If on any account the payment to the parties of any of the above allowances should be stopped the amount should be paid by you to Government

12 In respect to the abovenamed village you are considered farmer thereof; you are therefore to exercise the authority vested in farmers by Chapter VI of Regulation XVII of 1827 or such as may hereafter be vested in them by any new enactment shall also be exercised by you, and in the event of your acting contrary to the aforesaid enactments, you will be subject to such penalties as are now or may hereafter be provided for by Regulations

16 For breach of any of the conditions of this lease for which a specific penalty has not been laid down Government is at liberty to inflict such punishment as may be provided by Regulations and to cancel the lease and resume the village without reimbursing you for any expense you may have incurred No claim for losses will be attended to

18 Should you wish to sell or transfer the said village in any way whatever to any other person you are to apply to Government for permission to do so, and if the person to whom you may wish to transfer the above village shall be approved of by Government it will grant you such permission, and you are then at liberty to transfer it to him The farm of the village in question is to be held by one individual as an undivided property, and is, in cases of succes-

sion to be considered as concerns Government, the property of the head of the family

Subsequently the grantee sold his rights under the *kowl* to Hariprasad Santukji, Narayanji Shamji and Jamnadas Bapuji These persons conveyed their rights to the plaintiff's father Haji Sumar Haji Karim in December 1880 and by the order of the Collector the village was transferred to the vendee's name on the 30th September 1881 Owing to the prevalence of the plague in Bombay and its suburbs, several occupants of the land in the village having erected residential quarters on their holdings, the Government of Bombay in the year 1906 imposed enhanced assessment on lands which were converted into building sites under the provisions of the Bombay Land Revenue Code (Bom Act V of 1879) The grantee under the *kowl* himself claimed the right to recover the enhanced assessment or at least a portion of it on the ground that the village was alienated and exempt from the provisions of the Land Revenue Code The Government, thereupon, issued a Resolution, No 1127, dated the 1st February 1907, to the effect that the grantee had no right to participate in the enhanced assessment with respect to the building sites The grantee, the plaintiff, therefore brought the present suit in the District Court at Thana against the Secretary of State for India in Council praying,

(1) It be declared that—

(*a*) the extra assessment imposed by the defendant upon the land appropriated for building sites in the village of Ghatkooper was illegal,

(*b*) the Land Revenue Code was not applicable to the said village,

(*c*) the Resolution of Government to the effect that the *kowl* was agricultural was erroneous

(2) The defendant be restrained by a permanent injunction from levying the aforesaid assessment

(3) The amount, if any, recovered by the defendant on account of such assessment be awarded to the plaintiff

The defendant denied that Ghatkooper was an "alienated" village or that the provisions of the Land Revenue Code (Bom

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Act V of 1879) were not applicable to it, and contended that the plaintiff was no more than a farmer of land revenue existing at the date of the *kowl* in accordance with section 20 of Bombay Regulation XVII of 1827 and Government did not otherwise transfer their rights to the payment of the land revenue, that the lease was granted not only without any stipulation against increasing the assessment but on the contrary with an express stipulation reserving the defendant's right to do so, that the object of the lease being clearly to promote cultivation in the village it was obviously agricultural in its character and Government had full authority to levy non agricultural assessment under sections 65 and 66 read with section 48 of the Land Revenue Code in cases the lands were diverted from their originally contemplated user during the currency of lease, and that the rights and benefits granted to the lessee were those specifically granted to him under the terms of the lease and the benefit of receiving enhanced assessment not being so granted, the plaintiff was not entitled to lay claim to any share in it whatever

The Joint Judge dismissed the suit holding that Ghatkooper was not an alienated village and the provisions of Bombay Land Revenue Code (Bom Act V of 1879) were applicable to it, that the terms of the lease did not disentitle the defendant from enhancing the assessment on building sites during the currency of the lease, that the plaintiff was not entitled to the said enhanced assessment and that he could not get any relief

The plaintiff appealed

D A Khare, *G B Rele* and *J G Rele*, for the appellant (plaintiff)

L A Shah (Acting Government Pleader), for the respondent (defendant)

CHANDAVARKAR J —The question whether the decree of the lower Court is right depends upon the main question argued in this case, whether the village in dispute is not an alienated village within the meaning of clause (19) of section 3 of the Bombay Land Revenue Code (Bom Act V of 1879)

The word "alienated" is defined in that Code to mean "transfer, in so far as the rights of Government to payment of the rent or land revenue are concerned, wholly or partially, to the ownership of any person"

The question is whether this village has been transferred to the ownership of the present appellant, so far as the rights of Government to the land revenue are concerned That is a question which must be decided upon the proper construction of the *kowl* (Exhibit 24) granted to the appellant's predecessor in-title in the year 1844-45

The terms of the *kowl* leave no matter whatever for ambiguity In dealing with the terms of that document it is necessary to bear in mind that in order to bring a village within the term "alienated," a transfer of the rights of Government must be a transfer of a particular kind namely, of the ownership of Government with reference to its rights to land revenue, not all rights of ownership

Now, the word "owner" does not require any definition, because its meaning is quite plain But if it is necessary to find out the meaning attached to it by the Legislature, we may usefully refer to the sections of the Transfer of Property Act, where 'transfer' is pointed out as being either by way of ownership, in which case the transaction amounts to a sale, an out and out assignment, or by way of gift, in which case also it may be by way of ownership But there are transfers of a more limited character such as transfer by way of mortgage, or lease or charge In the present case it is impossible to hold that the rights of Government have been transferred by way of ownership, having regard to the terms of the *kowl*

At the outset the preamble of the *kowl* shows that the village was leased to the grantee for a period of 99 years It is a lease of the revenues of the village on certain conditions One of those is 'that on the land which had already been under cultivation the grantee should pay Rs 1,135 14 7, and that as to the waste lands, the grantee should bring them all into cultivation within 40 years, and on the expiration of that period the full assessment, according to the prevailing usage of the country,

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should be collected annually from the grantee on such land as might be under cultivation, as well as on such quantity as might remain waste out of the present waste, entered in the public accounts" It is clear that the object of the lease was agricultural, that Government never parted with its rights, so far as the right to build was concerned That conclusion is strengthened by the subsequent conditions in the lease All these conditions refer to agricultural operations and objects Then the 6th condition is "It is clearly to be understood that this lease confers no right which Government does not now possess and only such portion of the rights of Government as may be herein specifically granted to the grantee, is hereby granted to you" In other words wherever the lease is silent about any right, that right must be regarded as not having been granted Now, the rights as to building are omitted altogether from the lease There is not a word said about them The necessary inference from that is that Government reserved to itself those rights

The 8th condition is also important That condition runs thus "Should a survey be made and a new assessment be introduced in the district, the same will also be done in your village, the land, etc, which has been granted to you free from assessment will, however, remain uninterfered with till the period of exemption has expired, when the rates will be levied Now that condition makes it quite clear even if there had been any ambiguity in the conditions that had gone before, that this village cannot be included in alienated villages because according to the provisions of the Bombay Land Revenue Code, in the case of an alienated village, Government cannot make a survey or fix an assessment unless it is invited to do so by the alienee, whereas, according to this 8th condition, Government has reserved to itself the right of making a survey and introducing a new assessment in this village, upon its own initiative without any invitation from the grantee

And in the 10th condition it is also distinctly stipulated that "if a complaint be made to Government in respect of payments to all Devasthans and Dharmadaya allowances, then the grantee is to act according to the orders of Government"

Then the 12th condition is also significant "In respect of the abovenamed village," that condition says, "you are to consider yourself as a farmer thereof", in other words, as a "lessee' It further says 'you are therefore to exercise the authority vested in farmers by Chapter VI of Regulation XVII of 1827 or such as may be hereafter vested in them by any new enactment, shall also be exercised by you, and in the event of your acting contrary to the abovesaid enactments" *i e* not only Regulation XVII of 1827 but any other which may subsequently be passed, "you will be subject to such penalties as are now or may hereafter be provided for by Regulations' That is sufficient to bring the village within the operation of the provisions of the Land Revenue Code

Then the 16th clause provides that "for breach of any of the conditions of this lease for which a specific penalty has not been laid down, Government is at liberty to inflict such punishment as may be provided for"

The 18th clause must also be read as having a bearing upon the question which we have to determine The grantee is prohibited by that condition from either selling or transferring the village in any way whatever, which would mean by way of gift or sale, or lease or mortgage, to any other person without the consent of Government This condition is usual in the kind of transfers known as leases, in which the lessor makes it a term that there shall not be any assignment by the lessee without his consent, either in writing or otherwise

Therefore, there cannot be any the slightest doubt that this *kowl* is no more than a lease that Government parted with its rights as lessor in favour of the grantee as a lessee, and imposed upon him certain conditions None of those conditions brings the contract within the definition of the term "alienated" village, in clause 19 of section 3 of the Bombay Land Revenue Code

For these reasons we are of opinion that the District Judge is right in holding that the plaintiff's claim must fail

In confirming his decree, however, we wish to make it quite clear that our decision is confined only to the buildings which have been erected, and to the extra assessment which Govern

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ment has imposed in respect of those buildings, under th provisions of the Land Revenue Code This decision does not i any way affect or prejudice such right as the plaintiff or Govern ment may have in respect of the assessment on agricultural lan We express no opinion whatever as to the latter The plaintif claim, as made in his plaint, and in his pleadings, was entirel confined to the extra assessment levied by Government in virtu of its right, under the provisions of the Land Revenue Cod to impose that assessment on occupants, who have built upo their respective lands Our decision, therefore, is confined onl to that extra assessment For these reasons the decree must b confirmed with costs

Decree confirmed

G B R

APPELLATE CIVIL

Before Mr Justice Chandavarkar and Mr Justice Hayward

1911 *July 2?*

THE COLLECTOR OF POONA (ORIGINAL PLAINTIFF) APPELLANT v BAI CHANCHALBAI (ORIGINAL DEFENDANT No 1), RESPONDENT *

Civil Procedure Code (Act XIV of 1882) section 539—Suit relating to public religious property—Ejectment of trespasser—Party of suit—Joinder of parties—Practice and procedure

Where a breach of trust is complained of and where the alienee of trust property denies that the property is the subject of a public trust for religious purpo es, he is a proper and necessary party to a suit brought under the provi sions of section 539 of the Civil Procedure Code of 1882 though no relief can be given as against him by way of a decree in ejectment

APPEAL from the decision of C Roper, District Judge of Poona, confirming the decree passed by K Barlee, Assistant Judge of Poona

This was a suit filed under the provisions of section 539 of the Civil Procedure Code of 1882 It was brought by the Collector of Poona to formulate a scheme of management with respect to the village of Navli, which had been dedicated to the mosque known as the Shamanshasur Pir Dargah at Supa

* Second Appeal No 097 of 1910

The village in question was mortgaged in 1875 with one Gulabchand by the then manager of the mosque in 1890 Gulabchand's son Harichand obtained a decree against his mortgagor In the execution of the decree the right to the income of the village was sold to one Tatyaji on the 5th December 1893 Tatyaji sold to Harichand on the 31st May 1896, the rights which he acquired by the purchase

From 1897 to 1905 Harichand made payment of small sums for celebrating the annual *Urus* at the mosque These were discontinued in 1906

In 1908, the Collector of Poona filed the present suit against Bai Chanchalbai (widow of Harichand) as guardian of her minor son Nemchand and others praying for the appointment of new trustees, for a declaration that the transactions of 1875, 1893 and 1896 were null and void, for an order vesting the village in the new trustees, and for an order for the eviction of Bai Chanchalbai from the possession of the village and delivery of it to the new trustees or in the alternative a permanent injunction directing her to pay the whole income or a portion of it to the new trustees every year

Bai Chanchalbai (defendant No 1) contended *inter alia* that the village of Navli was not a public religious trust property nor was the Dargah a public religious trust

In the Court of first instance a preliminary issue was raised, *viz*, Does the suit for the eviction of Nemchand fall within the province of section 539 Civil Procedure Code, and if not is this suit against defendant No 1 maintainable? This issue was found in the negative, and the suit as against Bai Chanchalbai was ordered to be dismissed On appeal, the District Judge took the same view The plaintiff appealed to the High Court

L A Shah, Acting Government Pleader, for the appellant

D R Patvardhan, for the respondent

CHANDAVARKAR, J —This was a suit brought by the Collector of Poona under section 539 of the old Code of Civil Procedure (Act XIV of 1882), alleging a breach of trust on the part of the

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trustee of the property in dispute, which is claimed to be a public *trust for religious purposes* *Defendant No 2 is the* trustee against whom the breach is alleged, defendant No 1 represents the person to whom the property is alleged to have been alienated by the trustee At the trial in the Court of the Assistant Judge at Poona, a preliminary question was raised, whether defendant No 1 was a proper and necessary party to such a suit brought under section 539 That Court answered *the question in the negative, on the authority of the decision of* this Court, in *Lakshmandas Parashram* v *Ganpatrav Krishna*[1], *Vishwanath Govind Deshmane* v *Rambhat*[2], *Kazi Hassan* v *Sagun Balkrishna*[3], that a suit to eject a trespasser from trust property is outside the scope of, and reliefs claimable under, that section Accordingly, the suit was dismissed as against defendant No 1 On appeal, the District Court has taken the same view

It does not follow from the decisions, on which the Courts below have relied, that to a suit of this character, where a breach of trust is complained of and where the alienee denies that the property is a public trust for religious purposes, he is not a proper and necessary party, because relief cannot be given as against him by way of a decree in ejectment Though such *a decree does not fall within the reliefs which the Court can* grant under section 539, it has jurisdiction to determine, *for the purpose of the reliefs which can be granted, whether* the property is a public trust for a religious purpose if that question is in controversy That was the question covered by the first and second issues raised at the trial, and the alienee (defendant No 1) is interested in it The question cannot be properly tried unless he is before the Court He is, therefore, a necessary party, though possession cannot be recovered from him in this suit, if the issues in question are found against him

There is a further ground why he is a necessary party The plaint alleges that he has taken the property from the trustee

(1) (1884) 8 Bom 365 (2) (1890) 15 Bom 148
(3) (1899) 24 Bom 170

with full knowledge of its character as a public trust for religious purposes and that he has for some years paid part of the income to and for the trust And in his written statement he asks the Court to direct him to make an annual payment out of the income of the property to the trusts, if the Court find that it is a public trust for a religious purpose These pleadings may fairly raise the question whether defendant No 1 has become a constructive trustee in virtue of the alienation on which he relies and by reason of his conduct In that view of the case he would be a necessary party *Jugalkishore* v *Lakshmandas Raghunathdas*(1) It is impossible to say at this stage whether such a case will be established That depends upon the evidence But judging from the pleadings, we must hold that defendant No 1 is a proper and necessary party, and that the suit as against him has been wrongly dismissed without trial

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COLLECTOR OF POONA v. BAI CHANCHAL BAI

The decree is reversed and the case remanded for disposal according to law Costs including those of this appeal to be costs in the cause

Decree reversed

P R

(1) (1899) 23 Bom 659

APPELLATE CIVIL

Before Mr Justice Chandavarkar and Mr Justice Hayward

NAGINLAL CHUNILAL (ORIGINAL PLAINTIFF) APPELLANT v THE OFFICIAL ASSIGNEE (ORIGINAL DEFENDANT) RESPONDENT *

1911
July 27

Presidency Towns Insolvency Act (III of 1909), sections 7, 66—Official Assignee—Third person s property taken in custody by Official Assignee—Suit by stranger—Civil Court—Right of suit

Where the Official Assignee takes into his possession property as belonging to the insolvent which a third party claims as his own the latter can bring a suit against the Official Assignee in a Civil Court to establish his right

APPEAL from the decision of M B Tyabji, District Judge of Broach

* Appeal No 40 of 1910 from Order

1911

NAGINLAL CHUNILAL v THE OFFICIAL ASSIGNEE

One Dahyabhai Chhotalal was adjudged an insolvent by the Insolvency Court at Bombay and his property was vested in the Official Assignee of the Bombay High Court The Official Assignee took into his custody certain furniture which was in the insolvent's possession The plaintiff claimed that the furniture belonged to him and was let by him to the insolvent He submitted his claim to the Official Assignee but it was disallowed The furniture was advertised for sale The plaintiff, thereupon, filed a suit against the Official Assignee in the District Court at Broach, for a permanent injunction prohibiting the sale

The learned District Judge held that he had no jurisdiction to entertain the suit and that the plaintiff's only remedy was to move the Insolvency Court at Bombay

The plaintiff appealed to the High Court

L A Shah, for the plaintiff

Ratanlal Ranchhoddas, for the defendant

The following cases were referred to in arguments —

In re Rassul Haji Cassum(1), *Ex parte Cochrane*(2) *In re Champagne, Ex parte Kemp*(3), *Re Crook Ex parte Collins*(4) *Ex parte Brown*(5) *White v Simmons*(6), *Ellis v Silber*(7) *Waddell v Toleman*(8), *Ex parte Davies*(9)

CHANDAVARKAR, J —This was a suit brought by the appellant against the Official Assignee of the estate of Dahyabhai Chhotalal Vakil, an insolvent, to obtain a permanent injunction restraining the Official Assignee and another person from selling certain articles as belonging to the estate of the insolvent In his plaint the appellant alleged that the articles in question belonged to him as owner, but that the defendants had taken possession of them as belonging to the insolvent The plaintiff, therefore, claimed a permanent injunction and a declaration that the articles were of his ownership

(1) (1910) 13 Bom L R 13
(2) (1875) L R 20 Eq 2
(3) (1893) 10 Morell 296
(4) (1892) 66 L T 29
(5) (1879) 11 Ch D 148
(6) (1871) L R 6 Ch 555
(7) (1872) L R 8 Ch 83
(8) (1878) 9 Ch D 212
(9) (1881) 19 Ch D 86

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The District Judge, in whose Court the plaint was filed, has held, upon a consideration of sections 7 and 86 of the Presidency Towns Insolvency Act (III of 1909), that the Court has no jurisdiction to try the suit, because the only Court which could take cognizance of such a suit is the Insolvency Court in the Presidency Town We think that view is not warranted by the provisions of the Act in question

Section 7 provides —

'Subject to the provisions of this Act the Court shall have full power to decide all questions of priorities and all other questions whatsoever, whether of law or fact, which may arise in any case of insolvency coming within the cognizance of the Court or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case

Now, the first observation that has to be made as to this section is that it is an enabling section It gives power to the Insolvency Court to decide all questions of priorities, and all other questions, which may arise in any case of insolvency coming within the cognizance of the Court It can hardly be disputed, in fact it is admitted, that before the Act came into force, the ordinary Courts had jurisdiction to entertain such claims against the Official Assignee The Official Assignee merely steps into the shoes of the insolvent for the purposes of his rights and his liabilities As has been pointed out in *In re Mapleback, Ex parte Caldecott*[1], "except where there is an offence against the Bankrupt law, or against some law in favour of creditors, the trustee is merely the legal representative of the debtor, with such rights as he would have had if not bankrupt" Therefore if the Official Assignee goes into possession of, or claims certain property as belonging to, the insolvent, whereas it is claimed by a stranger as his, then the stranger has by common law the right given to him of suing the Official Assignee, just in the same manner that he could have sued the insolvent, if he had not become bankrupt Now, such a right as this existing under the common law could be extinguished no doubt by an Act, but the extinction must be in express language or by some necessary

(1) (1876) 4 Ch. D 150 at p 156

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implication arising from any of the provisions of the Act. The language of section 7 is hardly adequate for the purpose of extinguishing the common law right. Further, the section in question says that "the Court shall have power to decide all questions of priorities and all other questions whatsoever." It is very doubtful whether it was intended by the Legislature that the Court should have the power to decide questions of title, as between the Official Assignee and a stranger, with reference to property, which is claimed by the Official Assignee as the insolvent's and which on the other hand is claimed by a stranger as his. Had that been the intention of the Legislature, the wording of the section would have been that "the Court shall have power to decide all questions." But, instead of wording it in that manner, the Legislature first of all brings in questions of a particular character, and then gives the general words "all other questions whatsoever." On the principle of *ejusdem generis* it is reasonable to argue that the Legislature did not intend questions of title to be brought for adjudication within the jurisdiction of the Insolvency Court. We need not, however, express any definite opinion upon that point. It is sufficient to hold that section 7 does not take away the jurisdiction of the ordinary Courts that already existed at the time this Act came into force.

Then we turn to section 86. That section provides:—

"If the insolvent or any of the creditors or any other person is aggrieved by any act or decision of the Official Assignee he may appeal to the Court and the Court may confirm, reverse or modify the act or decision complained of, and make such order as it thinks just."

Here, again, the language is insufficient to take away the right of suit which every person had against the insolvent before he became bankrupt, and which right the stranger continued to have as against the Official Assignee, as the legal representative of the insolvent. All that this section provides is that any person aggrieved by any act or decision of the Official Assignee may appeal to the Court, which means that if a person does feel that injustice has been done to him by any act of the Official Assignee, it is open to him to ask for redress at the hands of the Insolvency Court. But that does not shut out the jurisdiction of the ordinary Court.

The language of section 7 of the Act is a reproduction of section 102 of the English Bankruptcy Act of 1883, which again is a reproduction of section 72 of the Bankruptcy Act of 1869 No doubt there is a clause in section 102 of the former, which is not to be found in our Presidency Towns Insolvency Act (III of 1909) That clause gave power to the Court of Bankruptcy in England to refer any difficult questions of law and of fact triable by a jury, to the ordinary Court for determination And it is argued by Mr Ratanlal that from the omission of this clause from section 7 of the Indian Act, it is a legitimate inference that the Legislature here intended that the Insolvency Court alone ought to have jurisdiction to try all questions including those of title arising between an insolvent represented by the Official Assignee and any person claiming adversely to him But where a stranger claims certain property as his, as against an insolvent represented by the *Official* Assignee it is open to doubt whether the question is one which in the strict sense of the expression may be said to arise in the course of insolvency But assuming it does so arise, the power given by the English Law to the Insolvency Court to refer a question of law or fact to an ordinary Court does not necessarily exclude the ordinary jurisdiction of the latter Court to determine questions relating to the title of the insolvent to property as against a stranger We must, therefore, hold that the lower Court had jurisdiction to try this suit

The order of the lower Court is reversed and the case sent back to that Court for trial on the merits The costs of this appeal must be paid by the respondents

Order reversed

B R

ORIGINAL CIVIL

Before Mr Justice Davar

1911
February 28

TEMULJI JAMSETJI JOSHI PLAINTIFF, *v* THE BOMBAY ELECTRIC SUPPLY AND TRAMWAYS COMPANY, LIMITED, DEFENDANTS *

Negligence—Suit against Tramway Company—Passenger entering car while in motion—Contributory negligence

T brought an action against the Tramway Company claiming damages for injuries sustained by him by reason of the Company's negligence T alleged that while attempting to board a stationary tram car the car was suddenly started at a signal given by the conductor and the footboard tilted and slipped sideways from beneath T s foot, in consequence of which T lost his balance was thrown to the ground and his right foot was injured

Held, dismissing the suit, that the footboard was not loose and that T s fall was due to his attempting to enter a car while in motion and was not due to any fault or defect in the fixity of the board

Per Curiam —Whether there is a Bye-law or there is not a Bye law to that effect, the fact remains that if a passenger chooses to attempt to enter or leave a moving car, he does so at his own risk. It is not what a prudent or a reasonable man should or would do and if he does it and sustains injury while in the act of so doing it would be an accident or a misfortune for which the defendant Company would in no way be liable

THE plaintiff, Temulji Jamsetji Joshi, brought this action against the Bombay Electric Supply and Tramways Company, Limited, claiming Rs 5,000 by way of compensation for injuries caused to the plaintiff through the negligence of the defendant Company The plaintiff alleged that on the 16th November 1908, at about 8 30 p m, he saw a tram car belonging to the defendant Company standing still at a tram station near the Arya Samaj, and with the object of getting on the car he went up to the middle entrance, caught hold of the railing put his right foot on the footboard and was about to put his left foot on the car, when all of a sudden the car was started at a signal given by the conductor, the footboard tilted and slipped side

* Original Suit No 802 of 1909

ways from beneath the foot of the plaintiff, in consequence of which the plaintiff lost his balance and his hold on the railing and he was forcibly thrown to the ground and his right foot was severely injured The plaintiff attributed his injuries solely to the negligence of the defendant Company

In their written statement the defendant Company alleged that the car was not standing still when the plaintiff attempted to board it but that it was proceeding at a pace of about seven miles an hour to the next stopping place, when the plaintiff improperly and negligently tried to get on the car while it was in motion and, failing to make good his footing, fell

The defendant Company further denied that the footboard tilted and slipped slantwise or that in consequence thereof the plaintiff lost his footing and fell The footboard was examined two days after the accident and found not loose or in a defective condition The Company alleged that the plaintiff's injuries were occasioned solely by his own negligence and improper conduct in trying to board a tram car when in motion and in the alternative they alleged that the plaintiff contributed by his negligence to the accident in question

Jinnah and *Kanga*, for the plaintiff

Strangman, Advocate General, and *Inverarity*, for the defendants

DAVAR, J —The plaintiff in this case is employed in the workshops of the B B & C I Railway Company, and works there as a fitter, earning a rupee and twelve annas a day

On the 16th of November 1908, he was residing at Bandora, but having heard that there was illness in the family of his sister, who was residing at Foras Road, after finishing his work on that day, he went to his sister's house He found her child ill and he was sent to call in Dr Fernandez, who resides at Girgaum Back Road After having called at the doctor's bungalow, he started to go back to his sister's house He attempted to board one of the defendant Company's long bogey carriages and was trying to get in by the middle entrance,

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when he fell, his right foot got under one of the wheels and the wheel ran over and caused injuries to his toes He has filed this suit claiming Rs 5,000 from the defendant Company, charging that the accident and the consequent injuries were due to their negligence

The defendants deny that they were guilty of any negligence They charge on the contrary that the accident was due to the plaintiff's negligence, and in any event deny liability, alleging that the plaintiff was guilty of contributory negligence They say that the injuries complained of by the plaintiff are very much exaggerated and deny that he has suffered damage as claimed

The story told by the plaintiff, as to how this accident happened, is that on emerging from Girgaum Back Road into Charni Road he found one of the defendant Company s tram cars "standing still at a tram station near the Prarthna Samaj, and with the object of getting on to the car he went up to the middle entrance of the said car, caught hold of the railing, put his right foot on the footboard, and was about to put his left foot to the car, when all of a sudden the car was started at a signal given by the conductor and the said footboard tilted and slipped slantwise from beneath the foot of the plaintiff, in consequence of which the plaintiff lost his balance and his hold on the railing, and was forcibly thrown on the ground and his right foot was severely injured" This is his story as told by him in his plaint

In his examination before the Court he repeated this story as to the cause of his accident, and was fully examined by the learned Counsel who appeared for him on the whole of his case

In traversing the allegations of the plaintiff, the defendants say, "That the car mentioned in the plaint was not standing still when the plaintiff attempted to board it, the said car was running and in motion, it had passed the Prarthna Samaj stopping place and was proceeding at a pace of about seven miles an hour to the next stopping place, when the plaintiff improperly and negligently tried to get on the car when it was in

motion at a distance of about 165 ft from the Prarthna Samaj starting place and, failing to make good his footing, fell"

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After the plaintiff had been cross examined on the question of his own and the Company's negligence and just as the learned Advocate General was starting to question him as to his injuries and damages, it seemed to me that, if I found against the plaintiff on the question of negligence all the evidence that would have to be recorded on the question of the plaintiff's injuries and his damages would be entirely useless Mr Jinnah for the plaintiff told me that he had lengthy evidence to call on the latter questions Under these circumstances I suggested to the learned Counsel for both parties that the hearing should then be confined to the first three issues which covered the question as to negligence, and that the case should proceed further in the event of my finding in favour of the plaintiff on those issues Counsel on both sides assented to this suggestion and the evidence thenceforward was confined to the first three issues, which are (1) whether the alleged injuries to the plaintiff were caused by the negligence of the defendants, as alleged in para 5 of the plaint, (2) whether the said injuries were not caused by the negligence of the plaintiff, as alleged in para 3 of the defendants written statement, and (3) whether, if the defendants were guilty of negligence, the plaintiff was not guilty of contributory negligence

These questions involve considerations of facts, the legal principles involved in the consideration of the questions before me are well settled and clearly defined

In *Blyth* v. *Birmingham Waterworks Company*[1], Baron Alderson says —

"Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do The defendants might have been liable for negligence if unintentionally, they omitted to do that which a reasonable person would have done or did that which a person taking reasonable precaution would not have done

(1) (1856) 11 Exch 781

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IEMULJI JAMSETJI v BOMBAY ELECTRIC SUPPLY AND TRAMWAYS COMPANY LIMITED

The question of contributory negligence was considered in *Butterfield* v *Forrester*(1), as early as 1809, and the principle is most tersely put by Lord Ellenborough in one sentence, wherein he says "One person being in fault will not dispense with another's using ordinary care for himself"

Amongst the cases where charges of negligence are made and denied and contributory negligence pleaded, the case most favourable to the plaintiff is that of *Radley* v *London and North-Western Railway Company*(2), where Lord Penzance in delivering the judgment of the House of Lords lays down certain propositions of law which, he says, cannot be questioned

The first proposition is that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident

And as a qualification to this proposition the next proposition laid down is,

'that though the plaintiff may have been guilty of negligence, and although that negligence may, in fact have contributed to the accident yet if the defendant could in the result by the exercise of ordinary care and diligence have avoided the mischief which happened the plaintiff's negligence will not excuse him

I think it is necessary to refer to only one other case, that of *Wakelin* v *London and South Western Railway Company*(3), where Lord Watson, in the course of his judgment, lays down the law of negligence in the following words —

' It appears to me that in all such cases the liability of the defendant Company must rest upon these facts — in the first place that there was some negligent act or omission on the part of the Company or their servants which materially contributed to the injury or death complained of and in the second place that there was no contributory negligence on the part of the injured or deceased person But it does not, in my opinion, necessarily follow that the whole burden of proof is cast upon the plaintiff That it lies with the plaintiff to prove the first of these propositions does not admit of dispute Mere allegation or proof that the Company were guilty of negligence is altogether

(1) (1809) 11 East 60 (2) (1876) 1 App Cas 754
(3) (1886) 12 App Cas 41

irrelevant they might be guilty of many negligent acts or omissions which might possibly have occasioned injury to somebody but had no connection whatever with the injury for which redress is sought and therefore the plaintiff must allege and prove, not merely that they were negligent but that their negligence caused or materially contributed to the injury

With these principles before my mind, I will now proceed to discuss the evidence given in this case The plaintiff in his evidence maintains that the tram car was stationary when he attempted to enter it, and he relies on two acts of negligence on the part of the defendant Company and says that the accident and the consequent injuries were the direct result of these two acts of negligence First of all, he charges that the footboard of the middle entrance was loose and shook violently, when the tram started, as he was trying to get in, and, secondly, the conductor negligently and without giving him sufficient time to get in started the car, and the jerk with which the car started, coupled with the insecure condition of the footboard, caused the accident He then goes into details as to what happened afterwards, and tells the Court how the tram was stopped to pick him up, how it was stopped again to enable one of his witnesses to examine the footboard, and how it was stopped a third time before reaching the next stopping station in order to enable certain other witnesses also to examine the footboard His evidence is corroborated almost in every detail by his witness Mr Burjorji Framji Mehta, a young gentleman who had just then passed his pleader's examination and had not started practising as a pleader

[His Lordship after discussing the evidence in detail proceeded —]

After carefully considering all the evidence in the case, I have come to the conclusion that the footboard of car No 68 was not loose on the night of the 16th November 1908, and the fall of the plaintiff while attempting to board that car was not due to any fault or defect in the fixity of the board

And now we must look elsewhere for an explanation as to how the plaintiff fell and sustained the injuries he complains of

There is direct conflict of evidence between the plaintiff and his witness Mehta on the one side and his witness Lewis and

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the conductor and the driver of the tram car on the other side, as to whether the tram was stationary or in motion when the plaintiff attempted to get in and as to the exact spot at which he attempted to board the car

After the electrification of the tram cars in Bombay, certain Bye-laws have been sanctioned by the Government but they came into force after the date of the accident The previous Bye-laws, framed under section 24 of Bombay Act I of 1874, are published in the Government Gazette of the 15th of April 1875, at page 294, Part II One of them is, "Passengers are forbidden to enter or to leave the car while it is in motion" The horse trams for which these Bye-laws were made used to stop at all places to pick up and put down passengers The electric trams stopped at certain fixed places to take up and discharge passengers, and I take it that till the new Bye-laws came into operation, the old ones were in force But whether there is a Bye-law or there is not a Bye-law to that effect, the fact remains that if a passenger chooses to attempt to enter or leave a moving car, he does so at his own risk It is not what a prudent or a reasonable man should or would do and if he does it and sustains injury while in the act of doing so, it would be an accident or a misfortune for which the defendant Company could in no event be held liable

If this tram had been stationary when the plaintiff attempted to board it, I cannot conceive the possibility of his falling out It does not take many seconds for a man to get into a tram car from the road The evidence in the case conclusively establishes that electric trams after stoppage do not start with a jerk Standing instructions to all drivers are to start on the first notch and then get on to the second, the third, and the fourth notches one after the other Assuming that the board had been loose, if the tram car had been stationary when the plaintiff attempted to board it, he would not have fallen out. If the car had been stationary, his hand grip on the bar would have been firm, and, when one foot was on the footboard and the car had started, he would have had no difficulty in putting his other foot on and getting into the car The conductor and

the driver both say that the accident took place at some distance from the starting station and after the car had been in motion There is no doubt that the plaintiff's witness Mr Mehta was very much excited at the time of the accident The plaintiff says he told him not to sit down there like a woman but to take the names of passengers I have no doubt whatever that the excitement was due purely to good heartedness He ascertained the names of two or three passengers, wrote them on a piece of paper and put them in the plaintiff's pocket, and I quite believe that he was actuated in all he did by sympathy for a Parsee who had sustained injury He says, when he saw the plaintiff's head come up and disappear, the car was stationary, but I think there his powers of observation are again at fault The defendant Company in their plan, Exhibit No 3, in the *de bene esse* examination of Mr Crisp, put the place of accident at a distance of 183 ft from the stopping place near the Prarthna Samaj That plan is prepared on the statements made by the conductor Dolatia Raghu It may be that the tram had not proceeded so far, but to my mind, on the evidence before me, it is quite clear that the tram had left the stopping station and was in motion when the plaintiff attempted to board it The conductor Dolatia gave his evidence in a manner that impressed me favourably He said he started the tram when there were no passengers left at the Prarthna Samaj station to pick up, and I believe he is telling the truth there There is no doubt that the conductor also secured the names of some of the passengers He says he gave them to Mr Wilkinson His statement taken down by Mr Wilkinson, and the names of the o two witnesses are not forthcoming I do not believe that the defendants are intentionally keeping those back Mr Wilkinson is not in their service now and his letter to Mr Crisp of the 8th of February 1909, Exhibit A, in the *de bene esse* examination of Mr Crisp, is a very peculiar and unintelligible document After telling Mr Crisp that he was afraid if a suit was filed against the Company that the Company would not fare well, he suggests that therefore they should be prepared for eventualities "and secure the aid of the Police, if matters go too far' What

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he means exactly it is difficult to conceive He is not in the Company's service, and I have no doubt in my mind that I am told the truth when the defendants say they are not in possession of the report made by the conductor to Mr Wilkinson or of the paper containing the names of the two witnesses obtained by the conductor

The impression produced on my mind by the evidence given in this case is, that the plaintiff on that night when he emerged from Girgaum Back Road on to Charni Road, saw a tram moving away from its stopping station near the Prarthna Samaj and that he attempted to get in while the car was in motion If the car had been stationary, it seems to me that it is in the highest degree improbable that this accident could have happened The most probable explanation of the occurrence appears to me to be that the plaintiff tried to jump on the footboard while the car was in motion, that he failed to get a firm grip of the bar, that although he succeeded in putting one foot on to the footboard and raising his body, he immediately fell back owing to the motion of the car and his inability to grasp the bar firmly

I come to this conclusion with very great regret The plaintiff is a poor man, he undoubtedly sustained serious injuries which necessitated his remaining in Hospital from the 8th of November 1908 to the 6th of January 1909 He was not able to rejoin his service till the 11th of February 1909, and I have no doubt he is telling the truth when he tells me that he is not as strong and as fit to do his work after the accident as he was before He must have already spent a considerable sum of money in prosecuting this suit in this Court and his failure means ruin to a man of his means It is most lamentable under the circumstances that he should have come to this Court with a case that he is not able to establish

I find the 1st issue in the negative

I find the 2nd issue in the affirmative

Finding on the 3rd issue with regard to contributory negligence becomes unnecessary, as I have come to the conclu

sion that the accident and the consequent injury were due entirely to negligence on the part of the plaintiff

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I dismiss the suit, and I must do so with costs

Attorneys for the plaintiff Messrs *Kanga* and *Sayani*

Attorneys for the defendants Messrs *Craigie, Blunt* and *Caroe*

Suit dismissed

B N L

APPELLATE CIVIL

Before Sir Basil Scott Kt Chief Justice and Mr Justice Rao

KASHIRAM MANSING (ORIGINAL DEFENDANT 1) APPLICANT v. RAJA RAM WALAD DAYARAM PATIL (ORIGINAL PLAINTIFF), OPPONENT *

1911 July 13

Mamlatdars Courts Act (Bom Act II of 1906) sections 19, 23 (1), (2)(1)—*Civil Procedure Code (Act V of 1908) section 115—Possessory suit—Decree of the Mamlatdar dismissing the suit—Application to the Collector—Revision—Non interference with legal and regular findings of fact—Entry in Revenue Record*

A Collector acting under section 23 of the Mamlatdars Courts Act (Bom Act II of 1906) is not authorized to interfere with the findings of fact of the Mamlatdar in a possessory suit the findings being on their face legal and regular and arrived after a consideration of the evidence on record

The provisions of clause (2) of section 23 of the Act, which empower the Collector to interfere by way of revision when he considers any proceeding finding or order in a suit to be improper, must be harmonized with the provision in clause (1) that there shall be no appeal from any order passed by a Mamlatdar

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* Application No 87 of 1911 under extraordinary jurisdiction

(1) Section 23 (1) (2) of the Mamlatdars Courts Act (Bom Act II of 1906) is as follows —

23 (1) There shall be no appeal from any order passed by a Mamlatdar under this Act

(2) But the Collector may call for and examine the record of any suit under this Act, and if he considers that any proceeding finding or order in such suit is illegal or improper may after due notice to the parties pass such order thereon not inconsistent with this Act as he thinks fit

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KASTURAM MANSING v RAJARAM

Semble the word 'improper' in clause (2) of section 23 of the Mamlatdars Courts Act (Bom Act II of 1906) has no different meaning from the word 'irregular' occurring in the expression 'irregularity' in section 115 of the Civil Procedure Code (Act V of 1908)

The entry of a person's name as owner or occupier in the books of Revenue Authorities is not in itself conclusive evidence either of title or possession

Fatma Kom Nabi Saheb v *Darya Sahib*[1] and *Bhagoji* v *Bapuji*[2] referred to

APPLICATION under the extraordinary jurisdiction (section 115 of the Civil Procedure Code Act V of 1908) against the order of *A H A Simcox, Collector of East Khandesh*, reversing the decree of L K Kulkarni, Mamlatdar of Chopda, in possessory suit, No 17 of 1910

The plaintiff brought a possessory suit against the defendants in the Court of the Mamlatdar of Chopda, alleging that the land in dispute originally belonged to one Purushottam Chunilal, that the plaintiff acquired it under two purchase deeds dated the 6th October 1905 and 2nd February 1909, that he had been all along in possession and that the defendants had dispossessed him otherwise than by due course of law

The defendants contended that they had never relinquished possession, that they had monetary transactions with Purushottam Chunilal, the plaintiff's alleged vendor, and that the sale to plaintiff was *benami* on their behalf

Upon the said pleadings the Mamlatdar referred the parties to a Civil Court

The plaintiff applied in revision to the Collector, who sent back the case to the Mamlatdar for a re hearing On the remand the Mamlatdar recorded all the evidence, oral as well as documentary, and found on the issues that the plaintiff was not in possession within six months before the suit was filed and that the defendants had not obtained possession otherwise than by due course of law He, therefore, dismissed the suit

(1) (1873) 10 Bom H C R 187 at p 190 (2) (1888) 13 Bom 75

The plaintiff applied in revision to the Collector, who reversed the Mamlatdar's decree and ordered that possession be given to the plaintiff on the following grounds —

I think the Mamlatdar was radically wrong He considered the oral evidence and weighed it, but he did not consider the enormous weight of evidence of Government records in favour of plaintiff

1 Plaintiff has got the khata of the land changed from defendants names to his own at defendants consent

2 Plaintiff is the recognized owner in the Record of Rights

3 Plaintiff has been recognized as the man from whom fees should be taken for sub dividing the survey numbers

4 Plaintiff pays the land revenue

5 Plaintiff has a finding in his favour from the Mamlatdar himself (as Magistrate) in a trespass case relating to this land

I cannot see how all this evidence can be neglected or can fail to prove plaintiff's possession

Defendant 1 preferred an application under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908), urging *inter alia* that all the documents referred to by the Collector in his judgment would be no evidence of possession and that the Collector acted irregularly and beyond the jurisdiction vested in him by law A *rule nisi* was issued calling upon the plaintiff to show cause why the order of the Collector should not be set aside

Branson, with *J R Gharpure*, for the applicant (defendant 1) in support of the rule

Shortt, with *S V Bhandarkar*, for the opponent (plaintiff) to show cause

Scott, C J —This is an application to us to exercise our revisional powers under section 115 of the Civil Procedure Code with reference to an order passed by the Collector of East Khandesh purporting to be made under the revisional powers conferred upon him by section 23 (2) of the Mamlatdars' Courts Act (Bombay Act II of 1906)

The applicant was the defendant in a suit instituted in the Court of the Mamlatdar by the opponent The Court has power under the Mamlatdars' Courts Act to give immediate possession of

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lands used for agriculture to any person dispossessed or deprived thereof otherwise than by due course of law provided that the suit is brought within six months from the date on which the cause of action arose, the cause of action being deemed to have arisen on the date of the dispossession

It is provided in section 19 that if the plaintiff avers that he has been unlawfully dispossessed of any property the Mamlatdar shall proceed to hear all the evidence that is then and there before him and try the following issues —

(1) Whether the plaintiff or any person on his behalf or through whom he claims was in possession or enjoyment of the property or use claimed up to any time within six months before the suit was *filed, and (2) whether the defendant is in possession at the* time of the suit, and, if so, whether he obtained possession otherwise than by due course of law

When the case came first before the Mamlatdar, that officer, being of opinion that the dispute between the parties was of a *complicated nature fit to be decided in the Civil Court,* referred the parties to a Civil Court and came to no finding upon the statutory issues

There was an application under section 23 (2) of the Mamlatdars' Courts Act to the Collector that the Mamlatdar's order should be set aside and that he should be directed to hear the case The Collector on that application set aside the order and directed the Mamlatdar to hear the case The Mamlatdar then heard the case and recorded evidence, both oral and documentary, and decided the statutory issues in favour of *the defendant Accordingly the suit was dismissed with costs*

An application was then made to the Collector to set aside the order of the Mamlatdar and the Collector has set aside the order upon the ground that although the Mamlatdar has considered the oral evidence and weighed it, he has not considered the enormous weight of evidence of Government records in favour of the plaintiff, namely, (first), the plaintiff has got the *khata* of the land changed from the defendants' names to his own at the defendants' consent, (secondly), the plaintiff is the recognized owner in the Record of Rights, (thirdly) the plaintiff has been

recognized as the man from whom fees should be taken for sub dividing the survey numbers, (fourthly), the plaintiff pays the land revenue, and (fifthly), the plaintiff has a finding in his favour from the Mamlatdar himself as a Magistrate in a trespass case relating to this land The Collector then said he could not see how all this evidence could be neglected or could fail to prove the plaintiff's possession

Now it has long been recognized that the fact that a person's name is entered as owner or occupier in the books of the Revenue Authorities is not in itself conclusive evidence either of title or possession see the remarks of Sir Michael Westropp in *Jalma Kom Nabi Saheb* v *Darya Saheb*[1], and of Parsons, J, in *Bhagoji* v *Bapuji*[2]

The last piece of evidence which the Collector mentions, namely, that the plaintiff has a finding in his favour from the Mamlatdar himself as Magistrate in a trespass case relating to this land, apparently refers to a statement of the impression left upon the mind of the Magistrate in a criminal case to which the plaintiff was not a party on the record with reference to possession of the land The case was decided not upon the evidence before the Mamlatdar in the present suit

It appears to us that the Collector, in weighing the evidence which was before the Mamlatdar and coming to a different conclusion of fact with reference to the plaintiff's possession upon the evidence upon the record, has assumed the powers of a Court of appeal and not of a Court of revision

The provisions of clause (2) of section 23 which give the Collector power to interfere by way of revision when he considers any proceeding, finding or order in a suit to be improper must be harmonized with the provision in clause (1), that there shall be no appeal from any order passed by a Mamlatdar

We, therefore, think that the word 'improper' must have reference to some proceeding, finding or order on the face of it tainted with some impropriety akin to illegality The legislature which negatived the right of appeal cannot have intended that

(1) (1873) 10 Bom H C R 187 at p. 189 (2) (1886) 13 Bom 75

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the Collector should be free to act simply upon a difference of opinion between himself and the Mamlatdar as to the value or probative effect of parts of the evidence recorded by the Mamlatdar We are not prepared, as at present advised to hold that the word '*improper*' has any different meaning from the word '*irregular*' as occurring in the expression '*irregularity*' in section 622 of the Code of 1882, or section 115 of the present Code We are, therefore, of opinion that the Collector was not authorised by section 23 to interfere with the findings of fact of the Mamlatdar which were on their face legal and regular and arrived at after a consideration of the evidence recorded

For these reasons we set aside the order of the Collector and restore that of the Mamlatdar with costs throughout

The Rs 100, deposited with the Collector, should be refunded to the applicant

Order set aside

G I P

APPELLATE CIVIL

Before Sir Basil Scott Kt Chief Justice and Mr Justice Rao

1911
July 19

THE MUNICIPALITY OF HUBLI (ORIGINAL DEFENDANT) APPELLANT *v* LUCUS EUSTRATIO RALLI AND ANOTHER (ORIGINAL PLAINTIFFS) RESPONDENTS *

District Municipal Act (Bom Act III of 1901), sections 50 and 54—Hubli Municipality—Reclamation of the bed of a tank for Municipal Cotton Market—Damage caused to plaintiffs goods by sudden and extraordinary heavy rain—Suit for damages against Municipality—Burden of proof as to negligence in the reclamation work—Suit not maintainable—Vis major

The Hubli Municipality, a body corporate under the District Municipal Act (Bom Act III of 1901) took steps to provide a Municipal Cotton Market and they selected for that purpose a site of a large and ancient tank which had largely silted up The southern boundary of the tank was an embankment In reclaiming the bed of the tank the Municipality utilized a part of the embankment and made provision to prevent the flow of water In the month

* First Appeal No [illegible] of [illegible]

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MUNICIPALITY OF HUBLI v LUCUS EUSTRATIO PALLI

of June 1907 there was a sudden and extraordinary heavy rainfall at Hubli which practically overflooded the whole Municipal area and a quantity of goods in the plaintiffs Ginning Factory which was to the south of the tank was washed away or damaged Thereupon the plaintiffs brought a suit against the Municipality to recover damages alleging negligence on the part of the defendants in carrying out the reclamation work The defendants denied the plaintiffs allegation and answered that the damage to the plaintiffs goods was the result of the abnormal heavy rain in June 1907 and that no precautions on the part of the defendants could have averted the damage

Held that the suit was not maintainable The onus of proof of negligence lay on the plaintiffs and if the neglect in the execution of their statutory powers and duties was not brought home to the Municipality, a suit against them must fail as being unsustainable in law, howsoever great the damage the plaintiffs might have suffered from the extraordinary flooding uncontrolled by the old tank dam

PAO J —The damage was mainly, if not wholly attributable to the extraordinary fall of rain It was an occurrence in the nature of *vis major* for which the defendants were not responsible

FIRST appeal against the decision of R G Bhadbhade, First Class Subordinate Judge of Dharwar, in Suit No 780 of 1907

The plaintiffs sued to recover from the defendants the Municipality of Hubli, Rs 10,145 15 6 being the amount of damages caused to their goods which they had stored in certain factories at Hubli on the 7th June 1907 by the rush of water from a tank under reclamation by the defendants The circumstances under which the damage was caused were alleged as follows —

To the north of the factories, wherein the plaintiffs' goods, cotton, &c, had been stored, there was an area of land which some time before the suit formed a tank known by the name of Gulkawa's tank, enclosed along its southern boundary by an embankment or dam The tank was under reclamation by the defendants for the purpose of extension of Municipal Cotton Market The defendants, in the course of their reclamation operation, removed the dam at the southern extremity of the tank, altering the levels of the tank bed and its surroundings and diverting the natural and customary flow of water, having formed a tank at the north east corner of the dam and directed a considerable flow of water into it, also for their own purposes Such was the situation of things on the 7th June 1907, when

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there was rain at Hubli The direct consequence was that a large body of water, by force of the defendants' operation, flowed into the tank at the north-east corner of the dam and into the area under reclamation, and owing to the changes of levels and diversion of water and the removal of the dam by the defendants without due provision for the control or disposal of water thus collected, the same flowed into the plaintiffs' factories and damaged their goods in spite of their efforts to save them The damage sustained was the direct result of the action of the defendants, by reason of their negligence and wrongful acts They were therefore liable to pay the damages

The defendants answered —

They were not responsible for the damages sustained by the plaintiffs because the rain that fell on the 7th June 1907 was extraordinary and excessively heavy, having been 2 inches and 91 cents within 30 or 40 minutes It was a case of *vis major* and no precaution on the part of the defendants would have averted the damage, which would have occurred even if the old state of things, that is, the height of the south dam and level of the tank bed, had not been changed in the least The claim was time barred being not within six months from the date of the act complained of The damages claimed were excessive and the allegation in the plaint as to neglect and wrongful act on the defendants part was not true

The Subordinate Judge found that the claim was not time barred, that the defendants' action in removing the dam and altering the levels of the tank bed, &c, as alleged in the plaint caused the overflow of water into the plaintiffs' factories and that the plaintiffs had suffered damages to the extent of Rs 9,677 9 7 He, therefore passed a decree accordingly The following are the extracts from the Subordinate Judge's judgment —

The witnesses evidence shows that the precautionary measures adopted by the defendants before this flood as to the drainage of the reclaimed site were faulty and insufficient and that the small tank with its low mounds on two sides could not have drained the adjacent reclaimed site and the waste-weir works were also not satisfactory

* * * * * *

Vis major or an act of God means not a mere misfortune but something overwhelming such as storming lightning and tempests which could not happen by the intervention of man and loss from which could not have been prevented by any reasonable amount of foresight, pain or care (Stroud's Judicial Dictionary) To be regarded as an act of God the occurrence must not only be unforeseen but incapable of being foreseen (per Tayabji, J at p 926, 1 Bom Law Reporter citing Encyclopædia of Law) and absolutely incapable of being prevented or guarded against Even supposing that the flood and rainfall of the 7th June was in the nature of *vis major* which I think it was not *vis major* to afford a defence must be the proximate cause—*causa causans* and not merely a *causa sine qua non* of the damage complained of The mere fact that *vis major* co-existed or followed on the negligence of the defendants is no adequate defence (*Municipal Corporation of Bombay* v *Vasudeo* VI Bombay Law Reporter 899)

* * * * * * * * *

On the whole then I have no doubt in finding that the defendants act in removing the big *bund* before completing their drainage works was most unwise, that the drainage provided for before the storms was insufficient that the reclamation works were undertaken and executed unsystematically and without taking the required levels of the adjacent sites and without an estimate of the quantity of water that would run into the small tank, and providing means for its proper discharge without flooding the neighbouring sites

The defendants appealed

Weldon with *N A Shiveshvarkar* for the appellants (defendants)

Strangman (Advocate General) and *Jardine* with *Little & Co* for the respondents (plaintiffs)

SCOTT, C J —This is an appeal from a decree of the First Class Subordinate Judge of Dharwar awarding Rs 9,677 to the plaintiffs as compensation for injury done to their cotton by water which the defendants in breach of their duty allowed to escape on to the plaintiffs premises

The defendants, the Municipality of Hubli, are a body corporate under the District Municipal Act (III of 1901) By virtue of section 50 of that Act property of various kinds is vested in them to be held and applied by them as trustees subject to the provisions and for the purposes of the Act and includes all public markets, tanks and works connected with or appertaining thereto, drains and culverts, and by section 54 it is provided that it shall be the duty of every Municipality to make reasonable pro on

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for *inter alia* the constructing, altering and maintaining all public markets, drains, drainage works, culverts, tanks, dams and the like

In or about the year 1904 the Municipality of Hubli took steps to provide a Municipal Cotton Market They selected for the purpose the site of a large and ancient tank known as Gull awa's tank which had largely silted up The southern boundary of the tank was an embankment The tank received the drainage of the land to the north of it and at the south eastern corner was a weir for the discharge of surplus water The tank area occupied about two thirds of a quadrangular space, of which the northern boundary was a public road known as the Station Road, and the western boundary, another road running from north to south The scheme of the Municipality was to drain the water coming to the culverts under the Station Road into a nálla on the eastern side of the quadrangular area and to conduct it into a small tank to be formed in the south eastern corner of that area whence the water would discharge eastwards over the old weir which it was proposed to deepen so as to allow of the passage of a larger body of water This scheme would leave such part of the old tank as was not included in the small new tank free for reclamation as a cotton market

In 1904 or 1905 the Municipality formed the smaller tank and utilized that part of the southern dam of the large tank which was not wanted to hold up the water of the small tank as spoil to fill in the area marked out for the market

The levels taken by the Commissioner as shown upon the map prepared by him for the purpose of the suit in the year 1908 indicate that over the centre of the reclaimed area there was nowhere a difference in level of more than one foot

At the same time the Municipality deepened and cleaned out the old nálla running along the east of the area and connected it up with culverts passing under the Station Road so that the water draining under that road passed into the nálla and thence into the small tank and discharged in time of flood over the weir.

This scheme of drainage and reclamation during the monsoons of 1905 and 1906 caused no trouble The monsoons were not particularly heavy ones and there was no day marked by any sudden and extraordinary rainfall In the year 1907 however upon the 7th of June an extraordinarily heavy fall of rain occurred at about 6 p m, amounting to nearly three inches in less than an hour The result was that practically the whole of the Municipal area was flooded, and a quantity of cotton owned by the plaintiffs was washed away or damaged

It appears that the plaintiffs in the year 1907 were doing business in the Ginning Factory of Ratanji Hormasji, using it for the purpose of storing ginned and unginned cotton, cotton-seeds and cotton bales This Ginning Factory was situated immediately to the south of the area of the old tank and adjoined the new Municipal Cotton Market It was however at a very much lower level than either the market or the bed of the old tank, and before the tank was drained and filled in, its water was prevented from flooding the Factory area by the southern dam

On the 10th of June 1907 the plaintiffs' Agent wrote to the Vice President of the Municipality informing him that owing to the dam of Gulkawa e tank adjoining the Ratanji Hormasji Ginning Factory having been unwisely removed by the Municipality and owing to the insufficient and faulty drainage in reclaiming the cotton market extension area all the water on the 7th instant instead of taking its proper course in the tank, rushed in the Ratanji Hormasji and the Alexandra Press Factory and caused serious loss amounting to Rs 90,000 or thereabouts The latter claimed damages on the ground that the loss had occurred owing to the negligence of the Municipality and requested them to take immediate steps to ascertain the extent of the loss

In consequence of this notice a Panch was formed which between the 9th and 20th of June inquired into the damage done and estimated it at something under Rs 3,000 This presumably was done under the provisions of section 165 (2) which provides that the Municipality may make compensation out of the Municipal fund to any person sustaining any damage by reason of the exercise of any of the powers vested in them under the Act

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The plaintiffs were not satisfied with this award and accordingly filed this suit, in the plaint in which they charge defendants with negligence in the following terms —

'The defendants have for some time been carrying on their work of reclamation of the tank In the course of their operations they removed the dam at the southern extremity of the tank, altering the levels of the tank bed and its surroundings and diverting the natural and customary flow of water having formed a tank at the north east corner of the dam and directed a considerable flow of water into it also for their own purposes This was the situation of things on the 7th June 1907, when there was rain in Hubli The direct consequence was that a large body of water by force of the defendants' operations flowed into the tank at the north east corner of the dam aforesaid and into the area under reclamation and owing to the change of levels and diversion of water and the removal of the dam by the defendants without due provision for the control or disposal of water thus collected the same flowed into the aforesaid factories and there damaged the plaintiffs' goods to the extent of Rs 10 145 15 6 at the lowest in spite of the plaintiffs efforts to save them'

Notice of suit was duly given within six months of the date of the injury complained of and no exception is taken in this appeal as to the sufficiency of the notice In order to establish their allegations of negligence the plaintiffs called only one witness, namely *Mahalingappa*, who *describes himself as the plaintiffs' Bazar man* He says his duties are to buy and sell goods for plaintiffs, to take delivery and prepare goods for sale and supervise all goods He states that between Gulkawa s tank and the factories there was a big dam, that until the demolition of the dam the water from the tank side never came into the factories but that great damage was caused on the 7th of June to goods in the factories as the dam had been removed and used by the defendants to level up the tank bed He says that a small bund to the north of the tank shown on the Commissioner's map was demolished by the defendants a few days before the rainfall and that that bund had been intended to prevent the running water from the culverts on the north side getting into the tank and to turn it into the nálla on the east Then he says that the mouth of the nálla on the east was formerly wider, but that its width had been lessened by cuttings made by the defendants, although he admits that the nálla bottom had been deepened and the bank raised He says that

formerly the ground at the northern end of the nálla sloped from south to north, but that the defendants had shortly before the rains cut the bank and made the ground level by which reason the greater portion of the water did not run into the nálla but over the marked area into the factory ground

I will first consider the last of these charges I do not think any negligence is proved on the part of the defendants No question was put to any of the defendants' witnesses upon the point nor is the charge made in the plaint Assuming the defendants did this work the levelling of the ground which had formerly sloped from south to north would obviously facilitate the flow of water from the eastern Station Road culvert into the nálla and even if the bank of the nálla had been cut into in order to afford access for the purpose of levelling the bed, the levels show that there was a rise of a foot and half to the west of that cutting which would have tended to direct the flow of the water into the nalla Moreover negligence is a relative term and I do not think defendants can be held guilty of it because at the moment they were engaged on a small improvement which left a gap in their system this extraordinary fall of rain came upon them see the observations of Bramwell B in *Ruck* v *Williams*[1] The alleged narrowing of the mouth of the nálla does not appear to me evidence of negligence in view of Mahalingappa's statement that the bottom was deepened and the banks raised and Mr Coen's evidence that the nálla was widened and cleaned out

In view of the evidence of Mr Coen who designed the drainage works, I am unable to accept the statement of Mahalingappa that there was any small bund to the north of the tank There was the water channel 4½ feet wide from the western culvert to the nálla on the sides of which the excavated earth had been thrown up Mr Coen cannot recollect whether the channel had been filled up before or after the flood of 1907 and replaced by another channel parallel with the Station Road

It is to be observed that none of the acts of negligence alleged by the plaintiffs witness supports the case made in the plaint which

(1) (185) 27 L J Ex 357

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alleges the collection of water in the small tank and on the old tank area and that the defendants failed in controlling and disposing of it, suggesting a case similar to that of *Rylands* v *Fletcher*[1]

There was in fact no collection of water upon the reclaimed area, and it appears to me that the plaintiffs' case so far as it rests on the removal of the dam must be based upon something in the nature of a servitude on the owner of the tank area to retain the dam by way of insuring his southern neighbours against floods from the north even after the tank site had been drained and filled in Such a servitude could only be acquired by prescription and there is no suggestion of the existence of any such right

The proximate cause of the injury to the plaintiffs' land was the extraordinary rainfall and it is difficult to see how in the general flooding of the town which must necessarily have followed, *and which is deposed to by Shankar Raoji Apte and* most of the defendants' witnesses, the plaintiffs' factory could possibly have escaped injury lying as it did at a much lower level not only than the tank area but also than the other surrounding land It is possible that if the old southern dam *had remained, extending from the western road to the point* where the weir discharged flood water, the floods to the *north* of the dam would have been checked or even carried off without injury to the plaintiffs It may I think be assumed that the officers of the Municipality thought in June 1907 that the work which involved the removal of part of the southern dam had contributed to the damage done to the plaintiffs and for that reason assessed the compensation payable

This compensation would be payable at the option of the Municipality to mitigate a hardship consequent on the execution of authorized works If the removal of the dam was not authorized by the provisions of the Statute under which the Municipality acted, or was conceived and carried out negligently and not as part of a reasonable scheme, then only would the plaintiffs be entitled to recover damages from the defendants by suit

[1] (1868) L R 3 H L 330 at p 339

Now in my judgment the scheme was a perfectly reasonable one The Municipality for the benefit of the cotton merchants at Hubli were providing a market at a convenient spot They were also providing for a drainage scheme which would take the place of the old primitive arrangement of a large tank and the evidence afforded by its success in the years 1905, 1906 and 1908 is strong reason for holding that there was no rashness or negligence in the design

The learned Judge has found that negligence was proved in carrying out the scheme in that the defendants' act in removing the big bund before completing their drainage work was most unwise, that the drainage provided for before the storm was insufficient, that the reclamation works were undertaken and executed unsystematically and without taking the regular levels of adjacent sites and without an estimate of the quantity of water that would run into the small tank and providing means for its proper discharge without flooding the neighbouring sites It does not appear to me that the evidence of Mahalingappa, the plaintiffs' Bazar man, who had no practical experience of drainage works and whose evidence was contradicted on various points by the defendants' more experienced witnesses, justifies these conclusions The scheme had stood the test of two monsoons, the rainfall of the 7th of June was far heavier than any which had occurred during the recollection of any of the witnesses who were examined upon the point and there is good evidence to show that the works that were in progress on the 7th of June were all works calculated to improve rather than impede the drainage

The respondents' Counsel endeavoured to persuade us that we had to deal here with the case of a natural stream diverted by the operations of an unauthorized stranger into a channel which was not sufficient in time of extraordinary flood to carry off its waters without injury to the plaintiff, in that case, it was said the defendants would on the authority of *Fletcher* v *Smith*[1] be liable if the combination of the removal of the dam with the extraordinary rainfall resulted in damage to the neighbouring

(1) (1877) 2 App Ca 781

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land owner The facts above set out show however that we are not here dealing with a natural stream and that the defendants can appeal to statutory authority with regard to their general scheme of operations

In a suit of this nature the onus of proof of negligence lies on the parties alleging it, see *Whitehouse* v *Birmingham Canal Company*[1], and if neglect in the execution of their statutory powers and duties is not brought home to the Municipality a suit against them must fail as being unsustainable in law however great the damage the plaintiffs may have suffered from the extraordinary flooding uncontrolled by the old tank dam see *Dunn* v *Birmingham Canal Company*[2]

For these reasons I am of opinion that the decree appealed from should be reversed and the suit be dismissed with costs throughout

RAO, J —The facts of this case are as follows —The plaintiffs are owners of certain Ginning factories at Hubli To the north of the factories there lies an area of land which until recently formed a public tank separated from the plaintiffs' premises by a dam 7 or 8 feet high which was the southern boundary of the tank Plaintiffs' land was on a lower level than the bed of the tank The tank was fed principally by the water from the nálla coming from the north side and running parallel to the tank The defendant-Municipality in whom the tank was vested resolved to reclaim the bed of the tank for the purpose of extending the Municipal Cotton Market In December 1904 they removed the dam and formed a small tank at the south east corner of the dam On 7th June 1907 while the reclamation works were in progress there was an unusually heavy fall of rain amounting to nearly three inches within half or three fourths of an hour The rain water accumulating on the reclaimed area flowed down to the plaintiffs' land, entered the factories, and caused considerable damage to the goods lying in their godowns On 23rd November 1907, the plaintiffs filed the present suit to recover from the defendants Rs 10,115 15 6 as damages for the loss sustained The cause of action alleged in the plaint was

(1) (1857) 27 L J Ex 25 (2) (1872) L R 8 Q B 42

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negligence on the part of the defendants in carrying out the reclamation works

The defendants contended, *inter alia*, that the damage to the plaintiffs' goods was the result of the abnormal heavy rain which fell on the 7th June 1907, that no precautions on their part could have averted the damage even if the old state of things *viz* —the height of the southern dam and the level of the tank-bed—had not been changed in the least The Subordinate Judge who tried the suit held that the damage complained of was wholly due to the defendants' negligence in carrying out the reclamation works and that, therefore, they were liable to make good the loss sustained by the plaintiffs He, therefore, passed a decree awarding to the plaintiffs Rs 9,677-9 7 as damages

Against this decree the defendants appealed to the High Court

At the hearing of the appeal the only question that was argued was whether the defendant Municipality was liable for the damage caused to the plaintiffs' goods by the flood water on 7th June 1907 I am of opinion that the defendants are not liable The old tank was a public tank vested in the local Municipality and in exercise of the powers conferred upon them under section 54 clauses (*g*) and (*i*) of Bombay Act III of 1901 the defendant Municipality reclaimed the greater part of the tank for the purpose of extending the Municipal Cotton Market In so doing they would not render themselves liable for any injury or damage caused to the neighbouring land owners, unless they acted with negligence in carrying out the reclamation works The burden of proving such negligence lies on the plaintiffs The Subordinate Judge found that the defendants' act in removing the big dam before completing the drainage works was most unwise, that the drainage provided before the storm was insufficient, that the reclamation works were carried out unsystematically without taking the required levels of the adjacent sites and without estimating the quantity of water that would run into the small tank and without providing means for its proper discharge I am unable to accept this finding as warranted by the evidence recorded in the case The only witness examined by the plaintiffs who speaks to the alleged wrongful acts on the part

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of the defendants is Mahalingappa who is plaintiffs' clerk (Exhibit 63) He states that the damage done to the plaintiffs goods was due (1) to the removal of the big dam which formed the southern boundary of the old tank, (2) to the removal of a small dam to the north of the tank which was intended to prevent the rain water from the culvert on the northside getting into the tank, (3) to the width of the nálla being lessened by the earth cutting made on its sides and (4) to the removal of the slope at the mouth of the nálla, with the result that the greater portion of the rain water did not run into the nálla but found its way along the course shown by the Commissioner on the map Exhibit 26 There is no dispute that the big *dam was removed at the end of* 1904, but no damage was done to the plaintiffs property in the rainy seasons of 1905 or 1906 Those were years of normal rainfall, and if no damage was done during those years it is clear that the damages caused by the flood of 1907 was not attributable to the removal of the big dam As to the small dam to the north of the tank, Mahalingappa is contradicted by Mr Coen (Exhibit 120) who was the Chairman of the Hubli Municipality in 1904 05 He says that after the removal of the big dam a temporary channel was made by the defendants about four and a half feet wide and two and a-half feet deep for the purpose of diverting the small quantity of water coming from the culvert in the north, that water had no bearing on the flooding of the *mills, that the soil was removed and put* on either side of the channel *but no dam was made* It is clear, therefore, from Mr Coen's evidence that there was no dam in existence to the north of the old tank and none was removed As to the width of the nálla being lessened, Mahalingappa is again contradicted by Mr Coen who says that the channel leading to the tank instead of being lessened was widened and cleaned out The Secretary to the Municipality (Exhibit 107) says that the Municipality not only cleaned but also deepened the nálla coming from the Station Road, and this is admitted by Mahalingappa Lastly with respect to the removal of the slope at the mouth of the nálla, neither *the Secretary nor the Chairman* of the Municipality have been cross-examined on this point Mahalingappa's evidence standing by itself and uncorroborated by any other evidence on the

plaintiffs' side is not entitled to any weight, and cannot be accepted as proving negligence on the part of the defendant Municipality Nor can any reliance be placed on the Commissioner's report (Exhibit 25) as to the condition of the reclaimed land on or before 7th June 1907, as it is based not on his personal knowledge but on an information given to him about 18 months after the date of the occurrence by Mahalingappa and others On the other hand there is the evidence of both the Chairman and the Secretary of the Municipality, which shows what precautionary measures had been taken by the Municipality for the drainage of the area under reclamation Mr Coen says as follows — "The dam of the Gulkawa tank was removed at the end of 1904 To prevent a rush of waters we widened the waste weir nearly to its uttermost width and lowered the same, by two feet to two and a half feet Also the channel leading to the tank was widened and cleaned out and the outlet channel beyond the waste weir was cleaned and widened A small tank was made at the south-east corner of the original tank and made five feet deeper than the original bed of the tank The sides of the tank were raised by about two feet to two and a half feet to let the water pass on more quickly After the demolition of the old tank these works were done The waste weir work was done simultaneously with the demolition of the tank Bandh and the deepening of the smaller tank was done one or two months after The cleaning, &c, of the outlet channel was done along with the waste weir work" Mr Coen is corroborated by the Secretary of the Municipality (Exhibit 107) This evidence is in my opinion entitled to considerable weight It shows the precautions taken by the Municipality for the proper drainage of the reclaimed area In the rainy seasons of 1904, 1905 and 1906 nothing occurred to show that these precautions were insufficient I am therefore satisfied that the Municipality acted with due care and caution in carrying out the reclamation works for the purpose of extending the Municipal Cotton Market The real cause of the damage done to plaintiffs' goods appears to me that owing to the unusually heavy fall of rain on 7th June 1907 water from all sides entered into the plaintiffs' land which was on a much lower level than the adjoining lands on the north and

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the west, and damaged their goods Witness (Exhibit 120) the Chairman of the Municipality says that he had been in Hubli over 20 years, that this was the most unusual downpour, and that even if the dam had not been demolished the same flooding would have been caused by the downpour, that the total rainfall on 7th July 1907 came to 2 inches and 91 cents in 40 to 45 minutes, and that he had not known during the last 20 years of rain falling more than one inch in the course of an hour This evidence, corroborated as it is by other evidence in the case clearly shows that the damage in the present suit was mainly, if not wholly, attributable to this extraordinary fall of rain It was an occurrence in the nature of a *vis major*, for which the defendants are not responsible The present case falls within the principle laid down in *Nichols* v *Marsland*[1]

Independently of this circumstance, I would hold that the defendant Municipality, in exercising the powers conferred upon them by Statute for the purpose of reclaiming the tank, acted with ordinary care and skill and after taking proper precautions for the drainage of the area under reclamation They are therefore not liable In *Geddis* v *Proprietors of Bann Reservoir*[2] Lord Blackburn says, "It is now thoroughly well established that no action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to anyone" So too in *Ricket* v *Directors, &c, of Metropolitan Railway Co*[3], it is laid down, "When an act is done by a company in excess of its powers, or in a wanton and careless use of them, there is an injury for which (an action lies) But things done by a company in the due execution of its powers are lawful, being duly authorized, and no action lies"

If the defendants had been private individuals and had undertaken or carried out the reclamation works in the exercise of their right of ownership, I do not think they would have been liable for the damage done to the plaintiffs' goods by the flood of 1907 Being owners of the land they were entitled to use it for every lawful purpose They had a right to reclaim it and make the best possible use of it they could, and in so doing

(1) (1876) 2 Ex D 1 (2) (1878) 3 App Cas 430 at p 455

(3) (1867) L R 2 H L 175 at p 203

there was no duty cast upon them by law to preserve the old dam for the benefit of the owners of the adjoining land which was situted on a lower level They were under no legal obligation to prevent the flow of the surface water from their land to the plaintiffs' property either by percolation or gravitation In *Rylands* v *Fletcher*[1] Lord Cairns observes, "If, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place If he had desired to guard himself against it, it would have lain upon him to have done so by leaving, or by interposing, some barrier between his close and the close of the defendants in order to have prevented that operation of the laws of nature" These observations apply to the present case

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On these grounds I would reverse the decree and dismiss the plaintiffs suit with costs

Decree reversed and suit dismissed

G B R

(1) (1868) L R 3 H L 330 at p 338

APPELLATE CIVIL

Before Mr Justice Chandavarkar and Mr Justice Hayward

MAHOMED IBRAHIM VALAD ABDUL RAHIMAN (ORIGINAL PLAINTIFF) APPELLANT, v SHEIKH HAMJA VALAD MAHOMEDALLI (ORIGINAL DEFENDANT), RESPONDENT.*

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Civil Procedure Code (Act V of 1908) section 11 Explanation IV—Res judicata—Redemption suit—Second suit in ejectment—Court—Discretion—In ejectment suit a decree for redemption can be passed—Practice and procedure

Where a person brings a redemption suit and fails his second suit in ejectment against the same defendant is not barred by *res judicata*

The question whether any matter might and ought to have been made a ground of defence or attack in a previous suit must depend on the facts of each

* Second Appeal No 861 of 1910

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case One important test is, whether the matters in the two suits are so dissimilar that their union might lead to confusion The matter involved in a suit in ejectment is essentially different from that involved in a suit for redemption In the first place where a person sues to eject he sues as owner of the property where he sues to redeem, he sues as owner of an interest in it, namely the equity of redemption, and the defendant as mortgagee is sued as holding the property as security for the debt Secondly in a suit for redemption, no question of title to the property is necessarily involved because if the mortgage set up by the plaintiff is proved and alive the mortgagee cannot deny the mortgagor's title but must allow him to redeem and sue him separately on the question of title If the mortgage is not proved the suit fails independently of the question of title

It is the practice of the Bombay High Court to pass a decree for redemption in a case in which the plaintiff has sued in ejectment That is purely in the exercise of the Court's discretionary power, and it can hardly be maintained that the plaintiff failing in an ejectment suit ought to pray for the alternative relief by way of redemption, when the Court is not bound to grant it as a matter of right

SECOND appeal from the decision of J D Dikshit, Assistant Judge of Thana, confirming the decree passed by N G Chapekar, Subordinate Judge at Mahad

Suit to recover possession of land

The plaintiff purchased the land in dispute from one Dhondrao who had mortgaged it with the defendant with possession before the date of the sale The plaintiff next obtained a redemption decree against the defendant Some time after, the plaintiff brought a suit (No 760 of 1906) against the defendant, alleging that he had given to the defendant the land in dispute for enjoyment till the expiration of the time in the mortgage deed under which defendant held another land and that the term of the mortgage being over he was entitled to the possession of the land in suit The suit was dismissed on the ground that the agreement alleged was not proved In 1909, the plaintiff brought the present suit against the defendant, to recover possession of the property from him

The Subordinate Judge dismissed the suit on the ground that it was barred as *res judicata* This decree was confirmed on appeal by the Assistant Judge

The plaintiff appealed to the High Court

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H C Coyaji, with *P B Shingne*, for the appellant

S S Patkar and *D C Virkar*, for the respondent

The following cases were referred to *Guddappa* v *Tirlappa*[1], *Naro Balvant* v *Ramchandra Tukdev*[2], *Bapuji Narayan Sane* v *Bapujirao bin Subhanrao*[3], *Narayan Khandu Kulkarni* v *Kalgaunda Birdar Patel*[4], *Tarachand* v *Bai Hanslı*[5]

CHANDAVARKAR, J —In holding the present suit barred as *res judicata* by the previous Suit No 760 of 1905, the Courts below have misapprehended the nature of the two suits The previous suit was for the redemption of a mortgage, the present is one in ejectment In the former the plaintiff alleged that the defendant had taken the property now in dispute in exchange for another property held by him as mortgagee, and he sought to redeem it The exchange by way of mortgage was held not proved and the suit was dismissed It was a decision that the plaintiff had not proved the mortgage set up by him, and that, therefore, his suit for redemption did not lie Now he sues on his title as owner to eject the defendant as trespasser "The relative rights and duties of owner and trespasser on the one hand and of mortgagor and mortgagee on the other are wholly different, and failure in a suit of simple ejectment does not in our opinion in any way bar the plaintiff in a subsequent suit to enforce his right to redeem as mortgagor" *Shridhar Vinayak* v *Narayan valad Babaji*[6] The converse of it was held by Westropp, C J, and Nanabhai Haridas, J, in *Govinda valad Bhivaji* v *Ganu valad Balaji*[7] To the same effect is the Full Bench decision of this Court in *Kaiji Shivram Joshi* v *Kaluram*[8] These were no doubt decisions under the Code of Civil Procedure of 1859, which did not contain such a provision as Explanation II to section 13 of the Code of 1882 But this Court followed *Shridhar Vinayak* v *Narayan valad Babaji*[6] in *Naro Balvant* v *Ramchandra Tukdev*[2], a case under the latter Code And the same provision is reproduced as Explana

(1) (1900) 25 Bom 189
(2) (1888) 13 Bom 3 6
(3) (18 3) L J 49
(4) (1889) 14 Bom 404
(5) (1904) 6 Bom L R 594
(6) (1871) 11 B H C R 224 at p 230
(7) (1876) 1 J 186
(8) (1873) 1 B H C R 100

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tion IV to section 11 of the present Code (Act V of 1908), which applies to the suit in this second appeal

The lower Courts would appear to have proceeded on the decision of this Court in *Guddappa* v *Tirkappa*[1] in applying the rule of *res judicata* to the present case But that decision rests on a different principle There the first suit had been for possession claimed by the plaintiff as the surviving co parcener in a joint family as against the defendant treated as a trespasser Failing in that suit, the same plaintiff sued as reversionary heir, treating again the same defendant as trespasser It was held that the second suit was barred, because, having regard to Explanation II to section 13 of the Code of Civil Procedure (Act XIV of 1882), in the previous suit he not only *might* but *ought* to have alleged his title as reversionary heir Both the suits were in ejectment in both the claim or title was that of owner, the only difference, as pointed out by Jenkins, C J, at the conclusion of his judgment, was in the source of the title alleged That made no difference as to the nature of the two actions

As observed by the Judicial Committee of the Privy Council in *Kameswar Pershad* v *Rajkumari Ruttun Koer*[2], the question whether any matter might and ought to have been made a ground of defence or attack in a previous suit must depend on the facts of each case and one important test is, whether the matters in the two suits are so dissimilar that their union might lead to confusion The matter involved in a suit in ejectment is essentially different from that involved in a suit for redemption In the first place, where a person sues to eject he sues as owner of the property, where he sues to redeem, he sues as owner of an interest in it, namely, the equity of redemption and the defendant as mortgagee is sued as holding the property as security for the debt Secondly, in a suit for redemption, no question of title to the property is necessarily involved because, if the mortgage set up by the plaintiff is proved and alive, the mortgagee cannot deny the mortgagor's title but must allow him to redeem and sue him separately on the question of title That was held to be the

(1) (1900) 25 Bom. 189 (2) (1892) L.R. 19 I.A. 234

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law by this Court in *Bapuji Narayen Sane* v *Bapujirao bin Subhanrao*[1] and in *Santaji bin Patlu* v *Bayaji bin Raghu*[2] Nor can the mortgagor dispute his own right to mortgage and that for the reason that in a mortgage the mortgagor covenants that at all events he has a good title per Lord Kenyon in *Cripps* v *Reade*[3], see also *Narayan Khandu Kulkarni* v *Kalgaunda Birdar Patel*[4] If the mortgage is not proved, the suit fails, independently of the question of title

It is true that it has been the practice of this Court to pass a decree for redemption in a case in which the plaintiff has sued in ejectment That, as remarked in *Parshotam Bhaishankar* v *Rumal Zunjar*[5], is purely in the exercise of the Court's discretionary power, and it can hardly be maintained that the plaintiff failing in an ejectment suit ought to pray for the alternative relief by way of redemption, when the Court is not bound to grant it as a matter of right

For these reasons the decree is reversed and the suit remanded to the Subordinate Judge's Court for trial on the merits according to law All costs to be costs in the cause

Decree reversed

R R

[1] (1873) P J 49
[2] (1876) P J 17
[3] (1796) 6 T R 606
[4] (1889) 14 Bom 404
[5] (1895) 20 Bom 196

APPELLATE CIVIL

Before Mr Justice Chandavarkar and Mr Justice Heaton

1911. July 24

CHHAGAN CHUNILAL BHAI GUJARATI (ORIGINAL PLAINTIFF) APPELLANT v SUKA VALAD BARKU AND ANOTHER (ORIGINAL DEFENDANTS) RESPONDENTS *

Contract—Instalments—Default in payment—Waiver—Effect of the waiver

The plaintiff agreed to sell certain lands to the defendants for Rs 1,000 in 1901 and put the latter in possession thereof the same day The material stipulations in the contract were as follows —(1) that the purchase money

* Second Appeal No 290 of 1910

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should be paid annually by instalments of Rs 100 each on a certain day fixed in the contract, (2) that in case of default in the payment of the first instalment on the due date, the plaintiff should be entitled to recover it as rent and sue for possession of the lands (3) that, in case of default in the payment of any three or four subsequent instalments on the due dates the plaintiff should be entitled to recover possession of the lands and claim the unpaid instalments as rent, and (4) that on payment of all the instalments the title to the lands should be treated as having passed to the respondent by sale but that in the meanwhile the plaintiff should continue owner thereof In 1908, the plaintiff filed the present suit to recover possession of the lands alleging default in the payment of the instalments which became due in 1901 1905 and 1906 The lower Courts dismissed the suit on the ground that the plaintiff had waived the payment of the first two instalments and probably the third also On appeal —

Held confirming the decree that as to the first three instalments the plaintiff dealt with the defendant in such a way as to show that he did not insist on payment on the dates fixed in the contract that, therefore, after that course of conduct he was not warranted in law in enforcing payment according to the strict terms of the contract without previous intimation to the defendant to that effect

Cornwall v Henson(1) followed

SECOND appeal from the decision of J Scotson, Assistant Judge of Khandesh, confirming the decree passed by R B Bhangavkar, Subordinate Judge at Amalner

Suit to recover possession of land

The land in dispute was sold by the plaintiff to the defendants in 1901 The terms of the deed of sale were (1) that the purchase money Rs 1,000 should be paid in equal yearly instalments on the dates specified, (2) that in default of payment of the first instalment on the due date, the plaintiff was to be entitled to recover it as rent and sue for possession of the land, (3) that in case of default in the payment of any three or four subsequent instalments on the due dates, the plaintiff was at liberty to recover possession of the lands and claim the unpaid instalment as rent, and (4) that on payment of all the instalments the title to the lands should be treated as having passed to the defendants but that in the meanwhile the plaintiff should continue owner thereof

(1) [1900] 2 Ch 298.

The first of these instalments fell due on the Margshirsh, Sud 5, Samvat 1959 (28th December 1902) It was not paid on the due date, but was allowed by the plaintiff to be paid nearly ten months later When the second instalment fell due in the month of Margshirsh of Samvat 1960, the plaintiff gave time to pay it till the harvest of Samvat 1961 It was paid more than one year after it became due The plaintiff alleged that the instalments of the years 1961, 1962 and 1963 were not paid at all He, therefore, filed the present suit to recover possession of the lands

The Subordinate Judge held that the clause about possession on default of payment of the first or subsequent year's instalment was penal, that Rs 100 were paid and accepted as the instalment of the first year and that the plaintiff was not entitled to claim possession under the terms of the contract

On appeal, the Assistant Judge confirmed this decree on the ground that there was distinct waiver as regards two of the instalments and most probably as regards the third, and that after such a course of conduct it was incumbent on the plaintiff to give notice to the defendants that in future he intended to enforce the terms of the contract

The plaintiff appealed to the High Court

Coyaji, with *W B Pradhan*, for the appellant

M V Bhat, for the respondent

The following cases were referred to *Kashiram* v *Pandu*[1] and *Jethabhai* v *Nathabhai*[2]

CHANDAVARKAR, J —The appellant brought the suit, out of which this second appeal arises, to recover possession of the two lands in dispute under the terms of a contract for sale in writing between him and the respondent By that contract, entered into in 1901, the appellant agreed to sell to the respondent the lands for Rs 1,000 The respondent was put in possession thereof on the day of the contract The material stipulations in the contract were these —(1) that the purchase money should be paid annually by instalments of Rs 100 each

(1) (1902) 27 Bom 1 at p 10 (2) (1904) 28 Bom 399 at p 407

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on a certain date fixed in the contract, (2) that in case of default in the payment of the first instalment on the due date, the appellant should be entitled to recover it as rent and sue for possession of the lands, (3) that, in case of default in the payment of any three or four subsequent instalments on the due dates, the appellant should be entitled to recover possession of the lands and claim the unpaid instalments as rent, (4) that on payment of all the instalments, the title to the lands should be treated as having passed to the respondent by sale, but that in the meantime the appellant should continue owner thereof

The appellant alleged in his plaint that there had been default by the respondent in the payment of the instalments of 1904, 1905 and 1906 He, therefore, sued for possession on the ground that there had been a breach of contract by the respondent and that the latter had by non payment of instalments put an end to the contract

The lower appellate Court, agreeing in that respect with the Court of first instance has found upon the evidence that there was "distinct waiver" by the appellant 'as regards two of the instalments and most probably as regards the third' The appellant bases his claim for possession on three subsequent defaults But the lower appellate Court has held that he is not entitled to it, because, after he had dealt with the respondent in respect of the first three instalments in such a manner as to lead the latter to believe that he would not insist on the payment of the instalments on the due dates, and that "he had no intention of carrying out the forfeiture clauses of the contract", "it was incumbent on him" to give the respondent "notice that in future he intended to enforce the terms of the contract"

We concur in this view of the law upon the facts found The appellant seeks relief substantially on the ground that the respondent abandoned the contract for sale and put an end to it by failing to pay the instalments on the dates fixed in the contract The question is—has there been abandonment on the part of the respondent? As to the first three instalments, the appellant dealt with the respondent in such a way as to show that he did not insist on payment on the dates fixed by the

contract. After that course of conduct, he was not warranted in law in enforcing payment according to the strict terms of the contract, without previous intimation to the respondent to that effect.

The case resembles, in its essential features, *Cornwall* v. *Henson*[1]. In that case, there having been default by the vendee (who as in the present case had been put in possession on the date of the contract) in the payment of the purchase money by instalments on the due dates, the vendor resumed possession. The vendee sued for specific performance, and the question was whether the vendee had by his conduct abandoned the contract. It was found on the facts that the vendee had been generally in arrear with the instalments but that the vendor had from time to time allowed a postponement. All instalments had been accordingly paid by the vendee but after due date in each case, except the last. As this last instalment had not been paid on the due date, the vendor claimed to treat the contract as abandoned by the vendee. It was held that he could not so claim. The Master of Rolls in his judgment said: "I think it is plain that the vendor never brought to the mind of the purchaser, so long as they were in communication with each other, that if he did not pay the last instalment the vendor would treat the contract as abandoned."

The decree must be confirmed with costs without prejudice to the rights, if any, of the appellant to recover any instalment or instalments under the contract, and to his right to possession, in case any instalment accruing hereafter under the contract is not paid on the due date fixed thereby.

Decree confirmed.

R. R.

(1) [1900] 2 Ch. 298.

APPELLATE CIVIL

Before Mr Justice Chandavarkar and Mr Justice Hayward

1911. *August 3*

KHUSHALCHAND PEMRAJ MARWADI (ORIGINAL DEFENDANT) APPELLANT, *v* NANDRAM SAHEBRAM MARWADI (ORIGINAL PLAINTIFF) RESPONDENT.*

Civil Procedure Code (Act XIV of 1882) sections 276 295, 320 325 A—Execution of decree—Attachment of property—Transfer of execution proceedings to Collector—Property re-attached under another decree between same parties—Second execution proceedings transferred to Collector—Claim under the first decree satisfied by compromise—Collector asked to return the darkhast *as disposed—Judgment debtor alienating the property—Claim for rateable distribution under another decree—Claims enforceable under the attachment—Bills of Sale Act, 1878, section 8—Practice and procedure*

In execution of a money decree which the plaintiff obtained against B, certain property was attached and ordered to be sold The execution proceedings were thereafter transferred to the Collector under section 320 of the Civil Procedure Code of 1882 In the meanwhile, the plaintiff obtained another money decree against B in execution of which the property was again attached These execution proceedings were also transferred to the Collector While the Collector was taking steps for the execution of the first decree the plaintiff informed the Mamlatdar who was carrying on the execution work on behalf of the Collector that his claim under the first decree was satisfied by B and that the *darkhast* should be returned to the Court as disposed of The Collector did so Ten days after this B sold the property to the defendant who out of the consideration moneys satisfied the plaintiff's first decree and other debts of B. The plaintiff obtained a third money decree against B in execution of which the property was sold through the Civil Court and purchased by the plaintiff himself at the Court sale He then sued to recover possession of the property from the defendant. In support of the plaintiff's claim it was contended (1) that the deed of sale relied on by the defendant was invalid having regard to the provisions of section 325A of the Civil Procedure Code (Act XIV of 1882) (2) that the Collector was not warranted in acting upon the plaintiff's admission that the decree had been satisfied because the satisfaction was one made out of Court and not having been certified to the Court it could not be recognised as a payment of the decree under section 258 of the Code and (3) that the sale to the defendant was illegal and void under section 276 because the property was on the date of the sale under attachment in the plaintiff's *darkhast* ultimately disposed of by the Collector on the strength of the plaintiff's application that it should be returned to the Court as disposed of in consequence of the decree

* First Appeal No 401 of 1901

Held, (1) that the sale to defendant was not void under the provisions of section 325A inasmuch as sections 322 to 325 presupposed a decree which had to be satisfied and which was therefore capable of execution That could not be said of a decree which its holder by his declaration to the Collector acknowledged to have been satisfied

(2) That the intimation to the Collector, who was in charge of the execution, amounted to a due certifying of the adjustment of the decree, which satisfied the conditions of section 258

Muhammad Said Khan v *Payag Sahu*(1), followed

(3) That section 276 did not apply, for though the attachment had existed at the date of the sale to the defendant and was never formally raised, the *darkhast* claim having been satisfied was no longer enforceable under it

Held further that the second attachment itself was illegal under the provisions of the last portion of the first paragraph of section 325A and it could not affect the private sale to the defendant by B.

Held also that the sale to the defendant was not illegal and void under section 276 of the Code by reason of the second *darkhast*

The moment the attachment of the plaintiff came to an end by reason of the satisfaction of his first decree sent to the Collector for execution all claims enforceable under the attachment ceased to be enforceable under it

A claim under another decree cognizable under section 295 ceased to be operative for the purposes of sections 276 and 295, the same being dependent upon the continuance of the said attachment

Sorabji E Warden v *Govind Ramji*(2) distinguished

Umesh Chunder Roy v *Raj Bullubh Sen*(3), *Gobind Singh* v *Zalim Singh* and *Kunhi Moossa* v *Makki*(5), followed

When a decree holder intimates to the Collector that his decree has been satisfied and that the necessity for its execution by the Collector has ceased to exist, the Collector's powers under sections 322 to 325 also cease because the very foundation of them, consisting in the fact of a decree which is alive and capable of execution has disappeared

The provisions of section 276 of the Civil Procedure Code (Act XIV of 1882) make the private alienation void not absolutely but only 'as against all claims enforceable under the attachment' referred to in it Where the execution proceedings in the course and for the purpose of which the attachment was made have come to an end on account of satisfaction of the decree by judgment debtor, and in consequence the decree is no longer alive the

(1) (1894) 16 All 228.
(2) (1891) 16 Bom 91
(3) (1882) 8 Cal. 279
(4) (1883) 6 All. 33
(5) (1899) 23 Mad 478

attachment also ceases and there is no longer any claim enforceable under the attachment to make the private alienation effected by the judgment debtor under the attachment void. The person for whose protection section 276 was primarily intended has had his claim in that event satisfied otherwise than by the attachment. As to any claim under another decree cognizable under section 295, that had been dependent on the continuance of the said attachment when that attachment was swept away, all other claims cognizable under it ceased to be operative for the purposes of sections 276 and 295. The only bar in the way of the private alienation was removed as if it never existed in law and the question as to the private alienation made by the judgment debtor to the defendant during the attachment became reduced to one between that judgment debtor and his alienee.

SECOND appeal from the decision of B. C. Kennedy, District Judge of Nasik, reversing the decree passed by V. D. Joglekar, Subordinate Judge at Pimpalgaon.

Suit to recover possession of property.

One Bapu Sakharam was the owner of the property in dispute. In 1900, Nandram Sahebram (the plaintiff) brought a suit (No. 614 of 1903) against Bapu and obtained a money decree. In execution of this decree, the Court attached the property and ordered it to be sold. The execution proceedings were then transferred to the Collector under section 320 of the Civil Procedure Code (Act XIV of 1882).

In 1901 the plaintiff obtained another money decree against the same judgment-debtor. The property was again attached in execution of this decree and the execution proceedings were also transferred to the Collector.

The Collector was in management of the property through the Mamlatdar, who was informed by the plaintiff, on the 21st May 1904, that his claim under the first decree was satisfied. On the same day the Mamlatdar made the following endorsement on the *darkhast*: "As the *darkhast* has been disposed of, the papers are sent that they may go to the Court." The Collector returned, on the 8th June 1904, the papers to the Court, where they were received on the 10th idem.

In the meantime, that is, on the 31st May 1904, the judgment debtor sold the property to Khushalchand (the defendant) in consideration of the moneys which the latter had advanced to

pay off the plaintiff's first decree and the other debts of the judgment debtor

The plaintiff obtained a third money decree against the judgment debtor He applied on the 16th June 1904 to execute the decree The Court attached the property again, and sold the same to the plaintiff in March 1905 The *darkhast* was disposed of

The *darkhast* to execute the plaintiff's second decree was pending It was disposed of in January 1906 on the plaintiff's informing the Court that the judgment debtor's interest in the property was sold already under his third decree

In 1907, the plaintiff applied for the second time to execute his decree in the second suit The property was again attached, but the attachment was removed on the 22nd June 1907 at the instance of the defendant On the same day, the plaintiff filed the present suit for a declaration that the property was liable to be attached and sold in execution of his second decree and that the sale to the defendant was void

The Subordinate Judge held that the sale deed to the defendant was passed for consideration, that it was not intended to defraud the creditors of the judgment, and that it was valid as against the plaintiff He, therefore dismissed the plaintiff's suit

This decree was on appeal reversed by the District Judge who held that on the day of the defendant's sale deed there was a valid attachment under which the plaintiff could recover The claim was therefore denied

The defendant appealed to the High Court

Nadkarni, with *P P Khare* and *D C Virkar*, for the appellant (defendant) —The plaintiff cannot rely on either of his two attachments as invalidating the sale to defendant The first attachment had ceased to exist on 21st May 1904, and there was thenceforward "no claim enforceable under *the* attachment" within the meaning of section 276 of the Civil Procedure Code (Act XIV of 1882) Refer to *Umesh Chunder Roy* v *Raj Bullubh Sen*[1], *Anund Loll Doss* v *Jullodhur Shaw*[2], *Abdul Rashid* v

(1) (1882) 8 Cal 279 (2) (1872) 14 Moo I A 543

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Gappo Lal[1], *Gobind Singh* v *Zalim Singh*[2], and *Kunhi Moosa* v *Makki*[3] The judgment-debtor having paid off the plaintiff's first decree out of the moneys he borrowed from the defendant, the judgment debt was wiped out The decree having thus been no longer in existence, the Collector's power to act under sections 322 to 325 had come to an end

Nor can the attachment under his second decree help the plaintiff The Court had no power to levy it as long as the first attachment was in force (*vide* section 325A, clause 1) This attachment was void, and the subsequent order of transfer of the proceedings to the Collector was void also The only course open to the judgment debtor was to follow the procedure laid down by sections 322 and 323 Referred to *Murari Das* v *The Collector of Ghazipur*[4]

Coyaji, with *N M Samarth*, for the respondent —It was not till the 8th June 1904 that the Collector re transmitted the execution proceedings to the Civil Court The necessity for the attachment had no doubt ceased on the 21st May 1904, when the plaintiff reported to the Mamlatdar that his claim was satisfied But the attachment continued as a matter of fact to exist till the 8th June 1904, that is, till the time the proceedings remained on the file of the Collector Further, the adjustment of the first decree was not certified to the Civil Court as provided for by section 258 Under section 325A, the sale to the defendant was void, for until the first action of re transmitting the proceedings to the Civil Court was taken, the Collector did not become *functus officio* He could exercise any of the powers conferred on him by sections 322 to 324 of the Civil Procedure Code (Act XIV of 1882)

The debt due under the second decree has remained unsatisfied The plaintiff took active steps to satisfy it The attachment placed by the Civil Court in execution of the decree may not be permissible, but the transfer of the execution proceedings to the Collector was notice to him of the existence of the second debt If the Collecter took no action, the plaintiff should not

(1) (1898) 20 All 421
(2) (1900) 23 Mad. 476
(3) (1883) 6 All. 37
(4) (1897) 19 All 318

suffer thereby He relied on sections 276 and 295 of the Civil Procedure Code, 1882 Referred to *Sorabji E Warden* v *Govind Ramji*[1]

Nadkarni, in reply, referred to *Muhammad Said Khan* v *Payag Sahu*[2] and *Lallu Trikam* v *Bhavla Mitha*[3]

CHANDAVARKAR, J —The question of law arising on this second appeal depends on a few facts, which are not in dispute and may be shortly stated, so far as they are material

The plaintiff who is respondent having in Darkhast No 1280 of 1900 in Suit No 614 of 1900, attached the property in dispute in execution of his money decree against his judgment debtor, Bapu Sakharam, the Court ordered the property to be sold, and under section 320 of the Code of Civil Procedure (Act XIV of 1882), then in force, transferred the execution to the Collector

While the Collector was in management accordingly, the plaintiff, on the 21st of May 1904, informed the Mamlatdar, who was carrying on the execution work on behalf of the Collector, that, as his judgment debtor had satisfied the decree, the necessity for sale had disappeared, and that the *darkhast* "should be disposed of" The Mamlatdar submitted the record and proceedings of the *darkhast* to the Collector on the same day with the following endorsement "As the *darkhast* has been disposed of, the papers are sent that they may go to the Court" On the 8th of June, the Collector forwarded the papers accordingly to the Court, and the latter received them on the 16th of June

In the meantime, that is, on the 31st of May 1904, the plaintiff's judgment-debtor, Bapu Sakharam, executed a deed of sale of the property to the defendant, in consideration of the moneys which the defendant had advanced for the satisfaction of the plaintiff's decree in the *darkhast* above mentioned, and also for payment of other debts of the said judgment-debtor

(1) (1891) 16 Bom 91 (2) (1894) 16 All 228
(3) (1887) 11 Bom. 478

The question is, whether this deed is valid, having regard to the provisions of section 325A of the Code of Civil Procedure (Act XIV of 1882)

The first limb of the first paragraph of that section provided as follows —

So long as the Collector can exercise or perform in respect of the judgment debtor's immoveable property or any part thereof, any of the powers or duties conferred or imposed on him by sections 322 to 325 (both inclusive), the judgment debtor or his representative in interest shall be incompetent to mortgage charge lease, or alienate such property or part except with the written permission of the Collector '

It is contended for the plaintiff (respondent) that, as the Collector was in management of the property in dispute on the date of the sale to the defendant, and could then have exercised the powers under sections 322 to 325, the plaintiff's judgment debtor was incompetent to sell and that the sale to the defendant is in consequence illegal and void The answer to that is that sections 322 to 325 presuppose a decree which has to be satisfied and which is, therefore, capable of execution That cannot be said of a decree, which its holder by his declaration to the Collector acknowledges to have been satisfied The acknowledgment here was made no doubt to the Mamlatdar but he was the Collector's agent and notice to him was notice to the Collector As a matter of fact, the Mamlatdar accepted the admission and acted upon it by disposing of the *darkhast* in the manner requested by the plaintiff, and the Collector upheld the Mamlatdar's action True, it was upheld by the Collector after the date of the sale to the defendant, but in law that action of the Collector related back to the date on which the Mamlatdar, as the Collector's agent, had passed his order disposing of the *darkhast*

When a decree holder intimates to the Collector that his decree has been satisfied and that the necessity for its execution by the Collector has ceased to exist the Collector's powers under sections 322 to 325 also cease because the very foundation of them, consisting in the fact of a decree which is alive and capable of execution, has disappeared

But it was said that the Collector was not warranted in acting upon the plaintiff's admission that the decree had been satisfied, because the satisfaction was one made out of Court, and, not having been certified to the Court, it could not be recognised as a payment of the decree under section 258 of the Code But the intimation to the Collector, who was in charge of the execution, amounted to a due certifying, which satisfied the conditions of section 258 *Muhammad Said Khan* v *Payag Sahu*[1] Our conclusions are confirmed by reference to Rule 15 of the rules under section 320 of the Code printed at page 52 of the High Court Civil Circulars, which provides that when execution has been as far as possible completed, the Collector *shall* re transmit the papers together with the execution proceedings to the Court

Then it was urged against the sale by the judgment debtor, Bapu Sakharam, to the defendant, that it was illegal and void under section 276 of the Code of 1882, because the property was on the date of the sale under attachment in the plaintiff's *darkhast* ultimately disposed of by the Collector on the strength of the plaintiff's application that it should be returned to the Court as "disposed of" in consequence of the satisfaction of the decree But though the attachment had existed then, and does not appear to have ever been formally raised, the *darkhast* claim, having been satisfied, was no longer enforceable under it

Consequently the sale to the defendant remained unaffected, so far as it concerned that *darkhast* claim

The question, then, is whether a separate *darkhast* (No 2439 of 1902) presented on the 13th of December 1902 by the plaintiff for the execution of another money decree against the same judgment debtor obtained in Suit No 634 of 1901, rendered the sale illegal and void under section 325A This separate *darkhast* was also transferred by the Court to the Collector for execution, after an order for attachment of the property because the latter had already been seized of the property under section 320 The attachment in execution of this decree, existing in fact on the date of the private sale to the defendant by the judgment-

(1) (1894) 16 All 228

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debtor, is relied upon by the learned pleader for the plaintiff (respondent before us) as rendering the sale in question illegal and void The learned District Judge has taken the same view, and in support of it he refers to the second paragraph of section 325A But he has overlooked the second limb of the first paragraph of the section, which provides "Nor shall any Civil Court issue any process against such property or part in execution of a decree for money" This second attachment was on that account illegal and could not affect the private sale to the defendant by the plaintiff's judgment debtor Further, the Collector does not appear to have taken any action under section 323 and, therefore, the case is untouched by the second paragraph of section 325A This separate *darkhast* in fact never was and never could have been referred to the Collector under section 320 by reason of the existing reference of the previous *darkhast* and hence was wholly unaffected by the provisions of section 325A of the Code

The question remains whether the sale by the judgment debtor, Bapu Sakharam, to the defendant was illegal and void under section 276 of the Code (Act XIV of 1882) by reason of this separate *darkhast* It might be argued that it was because, though the claim under this separate *darkhast* could not legally be enforced by transfer to the Collector, it was still a claim enforceable under section 276 read with section 295 of the Code, as held in the case of *Sorabji E Warden* v *Govind Ramji*[1], and confirmed by the explanation added to section 64 of the new Code (Act V of 1908)

But this argument is not supported by the language of section 276 and the authorities with reference to its proper construction and effect. The provisions of that section make the private alienation void, not absolutely, but only "as against all claims enforceable under the attachment" referred to in it Where the execution proceedings, in the course and for the purpose of which the attachment was made, have come to an end on account of satisfaction of the decree by the judgment debtor, and in consequence the decree is no longer alive, the

(1) (1891) 16 Bom 91

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attachment also ceases, and there is no longer any claim "enforceable" under the attachment to make the private alienation effected by the judgment-debtor during the attachment void The person for whose protection section 276 was primarily intended has had his claim in that event satisfied otherwise than by the attachment As to any claim under another decree, cognizable under section 295, that had been dependent on the continuance of the said attachment When that attachment was swept away, all other claims cognizable under it ceased to be operative for the purposes of sections 276 and 295 The moment the decree sent to the Collector was satisfied, everything dependent on it (in virtue of sections 322 to 325A) ceased to have legal effect and there was no claim left which was enforceable under *the* attachment All obstruction to the legal validity of the private alienation made during the continuance of the attachment having been removed, the alienation revived and became legal, because the question then came to be one entirely between the alienor and the alienee See *Umesh Chunder Roy* v *Raj Bullubh Sen*[1], *Gobind Singh* v *Zalim Singh*[2] and *Kunhi Moossa* v *Makki*[3] The principle of law applicable here is the same that was applied by the Court of Chancery in England in construing section 8 of the Bills of Sale Act of 1878 in *Ex parte Blaiberg In re Toomer*[4] Section 8 of that Act provided that a bill of sale of the kind specified there "shall be deemed fraudulent and void" as *against an execution creditor under certain specified* circumstances It was held by the Court that it was void, not to all intents and purposes, but merely to the extent of satisfying the claims of the persons indicated in the section, that the section was intended only for the benefit of the execution creditor, so that if the execution was swept away, as if it had never existed the bill of sale holder became entitled to the goods So here, the moment the attachment of the plaintiff came to an end by reason of the satisfaction of his first decree sent to the Collector for execution, all claims enforceable under the attachment ceased to be enforceable under it The only bar in the way of the private alienation was removed as if it never

(1) (1882) 8 Cal 279
(2) (1883) 6 All 35
(3) (1879) 2 Mad 478
(4) (1883) 23 Ch D 254.

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existed in law, and the question as to the private alienation made by the judgment-debtor to the defendant during the attachment became reduced to one between that judgment debtor and his alienee It was never competent for the former to contend that his sale was ever void as against him

For these reasons the decree appealed from must be reversed and that of the Subordinate Judge restored with the costs in this Court and in the lower Court of appeal on the respondent (plaintiff)

Decree reversed

R R

